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ENVIRONMENTAL LAW—TOO MUCH OF A GOOD THING: WHEN GOVERNMENT INVOLVEMENT IN WASTE DISPOSAL CROSSES THE LINE BETWEEN REGULATING AND 'OPERATING' UNDER CERCLA

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ENVIRONMENTAL LAW—TOO MUCH OF A GOOD THING: WHEN GOVERNMENT INVOLVEMENT IN WASTE DISPOSAL CROSSES THE LINE BETWEEN REGULATING AND "OPERATING" UNDER CERCLA

INTRODUCTION

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA")[1] has long been viewed by courts and commentators as a big gun with a loose and unpredictable trigger. From its inception, the statute has been read as having the broad remedial purposes of removing toxins from the environment and making the polluters pay the cleanup bill.[2] Consequently, courts have read CERCLA's liability provisions broadly, often in

1. 42 U.S.C. §§ 9601 to 9675 (1994), *amended by* the Superfund Amendment and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified as amended at 42 U.S.C. §§ 9605 to 9675 (1994)).

2. For the purposes of this Note, which focuses on CERCLA's liability scheme, the phrase "broad remedial purpose" refers only to polluter liability. This view of making those who pollute pay, dating back to the earliest CERCLA cases, has been summed up again and again in the catch-phrase "broad remedial purpose," which has become almost synonymous with the statute. *See, e.g.*, United States v. Bestfoods, 524 U.S. 51, 63-64 (1998) (holding that if and when the corporate veil is pierced, a parent corporation may be liable for CERCLA violations); United States v. USX Corp., 68 F.3d 811, 822 (3d Cir. 1995) (stating that "CERCLA . . . is to be construed liberally to effectuate its goals"); United States v. Kayser-Roth Corp., 910 F.2d 24, 26 (1st Cir. 1990) (stating that CERCLA is a "remedial statute designed to protect and preserve public health and the environment"); United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1378 (8th Cir. 1989) (noting that CERCLA's remedial "sweep" is "broad"); Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986) (stating that courts are "obligated to construe [CERCLA's] provisions liberally to avoid frustration of the beneficial legislative purposes"); CPC Int'l, Inc. v. Aerojet-General Corp., 731 F. Supp. 783, 791 (W.D. Mich. 1989) (stating that "by imposing strict liability on broad categories of defendants, Congress also evidenced its intent to make the responsible parties pay for the costs of the cleanup"); Rockwell Int'l Corp. v. IU Int'l Corp., 702 F. Supp. 1384, 1389 (N.D. Ill. 1988) (explaining that "Congress sought through CERCLA not only to expedite the cleanup of hazardous waste sites but also to assure the equitable allocation of associated costs among all responsible parties"); Colorado v. Idarado Mining Co., [1988] 18 Envtl. L. Rep. (Envtl. L. Inst.) 20,578, 20,579 (D. Colo. Apr. 29, 1987) (stating that the term "operator" must be interpreted liberally so as not to defeat the statute's purpose). *See generally* Janeen Olsen, Comment, *Defining the Boundaries of State Liability Under CERCLA Section 107(a)*, 2 VILL. ENVTL. L.J. 183, 184 (1991) (stating that CERCLA was created to give the federal government "a prompt and effective mechanism with which to respond to hazardous waste problems").

ways that conflict with traditional notions of liability.[3] Unfortunately for those courts that must apply this formidable liability scheme, CERCLA is equally well-known for its poor draftsmanship and vague language.[4]

Section 107(a) of CERCLA imposes liability upon any statutorily defined "person" who owns or operates a contaminating facility, or did so at the time the contamination took place.[5] There has rarely been confusion where the same party owns and operates the facility[6] in question. In contrast, when one party owns the facility and another party has some degree of control over the operation of the facility, there has been considerable confusion and variation in the courts' methods of assessing "operator" liability.[7]

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3. *See generally* Richard B. Stewart & Bradley M. Campbell, *Lessons from Parent Liability Under CERCLA*, NAT. RESOURCES & ENV'T, Winter 1992, at 7, 7 (noting that CERCLA's broad liability scheme often creates rulings that conflict with traditional notions of liability). The courts have read CERCLA liability as strict, retroactive, and capable of piercing the corporate veil. For further discussion of the courts' liberal readings, see *infra* notes 34-37 and accompanying text.

4. *See* Artesian Water Co. v. New Castle County, 851 F.2d 643, 648 (3d Cir. 1988) ("CERCLA is not a paradigm of clarity or precision. It has been criticized frequently for inartful drafting and numerous ambiguities attributable to its precipitous passage. Problems of interpretation have arisen from the Act's use of inadequately defined terms . . . ."); *Dedham Water Co.*, 805 F.2d at 1081 (noting that the Congressional purpose is "shrouded with mystery"); Kim E. Williamson & Thomas W. McCann, *After Union Gas II: The State as an "Operator" Under CERCLA*, 23 ARIZ. ST. L.J. 409, 409 (1991) (noting that vague CERCLA definitions have led to some degree of confusion among interpreting courts). For further discussion of CERCLA's vague wording, see *infra* notes 46-47 and accompanying text.

5. Generally, Section 107(a) imposes liability on four categories of covered "persons":

> (1) the owner and operator of a vessel or facility,
> (2) any person who at the time of disposal of any hazardous substance owned or operated a facility at which such hazardous substances were disposed of,
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance . . . .

42 U.S.C. § 9607(a) (1994).

6. "Facility" is a key term in determining CERCLA liability. For the statutory definition of the facility" requirement see *infra* note 27 and accompanying text.

7. The two most common situations in which this issue arises are government liability, the subject of this Note, and parent corporation liability, which is also addressed in this Note. See *infra* Parts I.B & I.C for a discussion of the development of operator liability in the context of government and parent corporation liability.

This confusion is particularly noticeable when a plaintiff seeks to impose CERCLA operator liability on a governmental body. There are many situations in which a federal, state, or municipally-owned facility could subject a governmental body or agency to liability.[8] However, governmental bodies, unlike private individuals, regulate waste produced by other parties' facilities for the public health and welfare.[9] Because of such regulation, governmental regulatory activities almost invariably meet at least some of the CERCLA liability requirements.[10] In addition, CERCLA's text and its treatment by the courts support the theory that such relationships may, in some circumstances, lead to liability for the government.[11] Consequently, courts and commentators have recognized that a conflict exists between two strong policy concerns related to government operator liability: (1) CERCLA's expansive liability scheme and (2) the need to protect governmental bodies from what could become almost unlimited liability for hazardous waste disposal.[12] While the courts must adjudicate government operator claims

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8. Some examples include federally owned facilities, such as those maintained by the Department of Defense or the Department of Energy. *See* Daigle v. Shell Oil Co., 972 F.2d 1527, 1533 (10th Cir. 1992) (examining the possibility of government liability for contamination at a Department of Defense facility). Because ownership and operating control are consolidated in one party (the applicable government body), liability would naturally attach to that party. *See* FMC Corp. v. United States Dep't of Commerce, 29 F.3d 833, 843-46 (3d Cir. 1994) (en banc). *But see id.* at 848-49 (Sloviter, C.J., dissenting) (stating that Congress did not intend to waive the government's sovereign immunity for this unique situation—steering war production).

9. *See* United States v. Township of Brighton, 153 F.3d 307, 324 (6th Cir. 1998) (Moore, J., concurring) (stating that "[u]nlike private persons, states and their political subdivisions possess and exercise regulatory power in their capacity as guardians of the public health, safety and welfare").

10. *See* Steven Ferrey, *The Toxic Timebomb: Municipal Liability for the Cleanup of Hazardous Waste*, 57 GEO. WASH. L. REV. 197, 233 (1988) ("Municipalities typically engage in one or more of four primary [liability-inducing] relationships when handling the solid waste generated within their borders."). See *infra* notes 26-30 and accompanying text for a discussion of the requirements for CERCLA liability.

11. *See* 42 U.S.C. § 9620(a)(1) (1994), which states:

> Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title.

Id.

In addition, 42 U.S.C. § 9601(21) includes "United States Government, State, municipality, commission, political subdivision of a State, or any interstate body" in its definition of "person." It is important to keep in mind that being a "person" is one requirement for liability under Section 107(a). For discussion of the courts' recognition and treatment of government liability, see *infra* Part I.C.2.

12. *See Township of Brighton*, 153 F.3d at 325-27 (Moore, J., concurring) (discuss-

with CERCLA's liberal liability scheme in mind, they must also take care not to overburden the government, and consequently the taxpayers (through increased taxes). Thus, it is still uncertain how much control the government must have over a facility before it becomes an "operator."

In 1998, the Supreme Court decided *United States v. Bestfoods*,[13] in which it provided a general definition of the term "operator" in the parent corporation context.[14] Prior to *Bestfoods*, courts had used operator liability tests as varied as the cases in which the issue had arisen.[15] Following *Bestfoods*, however, judges have divided into two factions regarding the appropriate test for government operator liability.

The first faction, typified by Judges Moore and Dowd in *United States v. Township of Brighton*,[16] advocates the use of multi-factor tests and requires that plaintiffs seeking to impose government liability meet a heavy, fact-intensive evidentiary burden.[17] This method is consistent with long-standing, well established methods of determining CERCLA liability in both the corporate and government contexts.[18] *Bestfoods* called this longstanding test into question by offering no more specific a test than a simplified definition of "operator."[19] However, *Bestfoods* did not explicitly dis-

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ing the importance of having a clearer "actual control" standard for district courts to use); *see also* United States v. Dart Indus., Inc., 847 F.2d 144, 146 (4th Cir. 1988) (holding that the state agency did not amount to an "owner" as defined by CERCLA and was, therefore, not liable); CPC Int'l, Inc. v. Aerojet-General Corp., 731 F. Supp. 783, 791 (W.D. Mich. 1989) (same).

13. 524 U.S. 51 (1998).

14. See *infra* text accompanying note 209 for the *Bestfoods* definition of operator. See *infra* Part II.A for further discussion of *Bestfoods*.

15. The courts have not been able to settle on any particular liability formulation. Rather, they have advocated various approaches that have emphasized different factual requirements. *See, e.g.*, *Bestfoods*, 524 U.S. at 64-66 (emphasizing control over the waste-creating mechanism as a key factor); Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund, 25 F.3d 417, 421-22 (7th Cir. 1994) (emphasizing active employee management and control over waste disposal mechanisms); Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 842 (4th Cir. 1992) (declining to require actual control, in favor of "authority to control" test); Washington v. United States, 930 F. Supp. 474, 483-85 (W.D. Wash. 1996) (refusing to hold government liable even though it managed workers, controlled finances, managed costs, and was aware of waste disposal measures); United States v. Iron Mountain Mines, Inc., 881 F. Supp. 1432, 1450 (E.D. Cal. 1995) (requiring "day-to-day" control).

16. 153 F.3d 307 (6th Cir. 1998). *Brighton* is the only circuit court case after *Bestfoods* to have considered the question of government operator liability.

17. *See id.* at 314-15.

18. See *infra* Part I.C for discussion of this heightened "actual control" test.

19. *See Bestfoods*, 524 U.S. at 66-67.

credit the use of traditional multi-factor tests.[20] Thus, judges in this group argue that the traditional multi-factor tests are a necessary auxiliary that assists in applying the *Bestfoods* definitional test.[21]

The second pattern, advocated by Judge Boggs in *Brighton*, simply requires satisfaction of the general definition found in *Bestfoods*.[22] Use of this lower evidentiary burden places governmental bodies on par with similarly situated parent corporations.

Part I of this Note examines the legislative, statutory, and common law background of CERCLA operator liability, focusing on how this background pertains to governmental bodies. Part II examines *Bestfoods* and *Brighton*, the only circuit court case since *Bestfoods* to examine government operator liability. Part III argues that the appropriate test for government operator liability is a synthesis of the *Bestfoods* test and the traditional multi-factor tests. Such a synthesis would appropriately balance the competing interests of CERCLA's broad remedial purpose and limited government liability.

I. BACKGROUND OF CERCLA OPERATOR LIABILITY

A. *CERCLA Liability: The Broad Remedial Purpose*

Congress designed CERCLA to provide the federal government with the "tools necessary for a prompt and effective response to problems of national magnitude resulting from hazardous waste disposal . . . [and to ensure] that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created."[23]

To accomplish this goal, CERCLA established a comprehensive response system that allows the Environmental Protection Agency ("EPA") to undertake cleanup using resources from what is commonly known as the "Superfund."[24] Alternatively, the EPA

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20. *See id.*

21. *See Township of Brighton*, 153 F.3d at 325-27 (Moore, J., concurring); *id.* at 333-35 (Dowd, J., dissenting in part, concurring in part); *see also* Delaney v. Town of Carmel, 55 F. Supp. 2d 237, 260-61 (S.D.N.Y. 1999) (analyzing a multitude of factors to determine if the party being charged as an operator had "actual and substantial control" over the facility).

22. *See Township of Brighton*, 153 F.3d at 314.

23. United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982); *see also* United States v. Alcan Aluminum Corp., 964 F.2d 252, 258 (3d Cir. 1992) (stating that CERCLA's primary purpose is to "force polluters to pay for costs associated with remedying their pollution"). See *supra* note 2 for the courts' recognition of this broad remedial purpose.

24. *See* 26 U.S.C. § 9507 (1994). Congress envisioned the Superfund as a hazard-

may bring suit against any potentially responsible persons to compel cleanup.[25] Liability is predicated upon four factors:[26] (1) the contaminated site's status as a "facility,"[27] (2) the defendant's status as one of four statutorily defined liable "persons,"[28] (3) the presence of a "release" or "threatened release" of a hazardous substance,[29] and (4) response costs incurred by a non-responsible party.[30] Once a defendant is deemed liable under the statute, that party becomes responsible for undertaking the cleanup, or for reimbursing the EPA if it conducted the cleanup.[31]

Once the cleanup is accomplished, CERCLA authorizes the party who paid for the cleanup (a governmental or private entity) to recoup its expenses by bringing suit against other parties respon-

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ous substance response trust fund out of which the federal government could pay for cleanup of contaminated sites. *See id.* Revenues for the fund were to be collected by reimbursement from other liable parties found to have caused the contamination. *See* 42 U.S.C. § 9607(c) (1994). Revenues were also to be collected through a tax imposed on certain industries. *See* Thomas A. Rhoads & Jason F. Shogren, *Current Issues in Superfund Amendment and Reauthorization: How Is the Clinton Administration Handling Hazardous Waste?*, 8 DUKE ENVTL. L. & POL'Y F. 245, 247-48 n.22 (1998). The status of the Superfund is a source of some legislative confusion today. Created as a companion to CERCLA, the Superfund was later reauthorized by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986). In 1990, Congress extended the Superfund's funding authority through 1994. *See* Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 6301, 104 Stat. 1388-319 (1990). However, since then, Congress has failed to amend or reauthorize CERCLA or the Superfund. Thus, there is no government money flowing into the fund, and the EPA has "taken steps to shut down the Superfund program if the financial resources are unavailable." Rhoads & Shogren, *supra*, at 250.

25. Potentially responsible persons are listed in 42 U.S.C. § 9607(a) (1994). For the full text of this section, see *supra* note 5. The government may bring suit against a private party to compel cleanup if "an imminent and substantial endangerment to the public health exists." 42 U.S.C. § 9606 (1994). *See also* B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1197 (2d Cir. 1992).

26. *See B.F. Goodrich Co.*, 958 F.2d at 1198; Donald M. Carley, Note, *Environmental Law—The Federal Government Must Share in the Pain of CERCLA Cleanup Costs*, 14 TEMP. ENVTL. L. & TECH. J. 93, 97 (1995).

27. All four categories of liability under § 9607(a) mention "facilities." CERCLA defines "facility" as "(A) any building, structure, installation, equipment, pipe or pipeline . . . well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located . . . ." 42 U.S.C. § 9601(9) (1994).

28. *See id.* § 9607(a) (listing the four categories). For the full text of this section, see *supra* note 5. It is the "operator" provision of this section that is the primary concern of this Note.

29. *See id.* § 9607(a)(4). Under this section, parties can only be held liable if there is a "release, or a threatened release . . . of a hazardous substance." *Id.*

30. *See id.*

31. *See id.* § 9607(a).

sible for the contamination.[32] The party that brings suit must then show that the four-part test for liability applies to the third party as well.[33]

To include as many potential contributors as possible, courts have taken a broad approach to CERCLA liability, reading the statute as requiring strict liability,[34] allowing piercing of the corporate veil,[35] and allowing retroactive liability.[36] In addition, liability is not limited to current owners or operators of polluting facilities,

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32. *See* United States v. Reilly, 546 F. Supp. 1100, 1112 (D. Minn. 1982). If the government funds the remedial action, it may bring suit against any parties responsible for the contamination. *See* B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1197 (2d Cir. 1992). Alternately, if a private party is forced to undertake the cleanup, that party may bring suit for cost contribution against other responsible persons. *See id.* at 1197-98; *see also* Bernard J. Reilly, *Superfund Reform for the 105th Congress*, SC27 ALI-ABA 1, 5-6 (1997) (describing Superfund authorization for EPA to recoup cleanup costs).

33. See *supra* notes 27-30 and accompanying text for a discussion of these four factors.

34. CERCLA states that liability "shall be construed to be the standard of liability" applicable under the Clean Water Act, 33 U.S.C. § 1321 (1994). *See* 42 U.S.C. § 9601(32) (1994). The courts have read the Clean Water Act as imposing strict liability, a fact that Congress was aware of at the time CERCLA was passed. *See* S. REP. NO. 96-848, at 32 (1980). As such, the intent of the actor is irrelevant to CERCLA liability, and some parties may be held liable even if they made no affirmative acts. *See* General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1418 (8th Cir. 1990) (noting that CERCLA is a strict liability statute with only a limited number of defined defenses available) (citations omitted); United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 731 (8th Cir. 1986) (stating that the district court held that CERCLA imposes a standard of strict liability); New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985) (noting that Congress intended for CERCLA to be a strict liability statute, even though the statute contains no such express provision).

35. *See* United States v. Bestfoods, 524 U.S. 51, 62-63 (1998) (holding that a parent corporation may be liable under CERCLA for its subsidiary's actions, relying on common law principle that the corporate veil may be pierced when the corporate form is being misused); United States v. Carolina Transformer Co., 739 F. Supp. 1030, 1038 (E.D.N.C. 1989) (holding corporate officer liable based upon the officer's day-to-day control over the business), *aff'd*, 978 F.2d 832 (4th Cir. 1992); United States v. Conservation Chem. Co., 628 F. Supp. 391, 416-17 (W.D. Mo. 1986) (supplemental mem. op.) (holding corporate officer liable because he was primarily responsible for the facility's environmental controls), *modified*, 681 F. Supp. 1394 (W.D. Mo. 1988).

36. Courts have stated that the legislative history and plain language of CERCLA point to retroactive liability. First, the covered persons provisions of CERCLA, 42 U.S.C. § 9607 (1994), use the past tense when describing acts leading to liability. *See Northeastern Pharm. & Chem. Co.*, 810 F.2d at 732-33 (stating that defendants may be liable for materials disposed of prior to CERCLA's enactment). Second, CERCLA's "statutory scheme itself is overwhelmingly remedial and retroactive." *Id.* (citing H.R. REP. NO. 96-1016, pt. 1, at 22 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6125); *see also* United States v. Shell Oil Co., 605 F. Supp. 1064, 1075 (D. Colo. 1985) (stating that CERCLA's "effective date" provision merely "indicates the date when an action can first be brought and when the time begins to run for issuing regulations and doing other future acts mandated by the statute").

but attaches to any former owners or operators who were responsible for contamination.[37] In further support of its broad remedial purpose, CERCLA lists only three narrow defenses to liability for an established owner or operator: contamination caused by an act of God,[38] an act of war,[39] or the act of a third party.[40]

B. *"Operator" Liability Under CERCLA*

CERCLA's operator provisions[41] include a broad pool of potentially liable parties. Rather than being limited to just the facility's owners, litigants may also seek contribution from those "persons" that operated the facility.[42] In *United States v. Bestfoods*,[43] Justice Souter, writing for a unanimous Court, noted that this enlarged group of potentially liable parties could even include "a saboteur who sneaks into the facility at night to discharge its poisons out of malice."[44] The term "operator" is thus pivotally

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37. *See* 42 U.S.C. § 9607(a)(2) (1994) (holding liable "any person who at the time of disposal of any hazardous substance owned or operated" a contaminating facility); North Carolina *ex rel.* Howes v. W.R. Peele, Sr. Trust, 876 F. Supp. 733 (E.D.N.C. 1995) (holding former corporate owner of a facility liable even though the corporation was dissolved).

38. *See* 42 U.S.C. § 9607(b)(1) (1994). The statute defines "act of God" as "an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight." *Id.* § 9601(1). This defense has remained relatively untested and largely useless to defendants. *See* United States v. M/V Santa Clara I, 887 F. Supp. 825, 843 (D.S.C. 1995) (holding that a storm at sea was not an "act of God" because it had been forecast, and thus could have been protected against).

39. *See* 42 U.S.C. § 9607(b)(2) (1994). Although "act of war" is undefined in CERCLA, one court has defined the term as the use of retaliatory force taken by a state to inflict damage on an enemy. *See* United States v. Shell Oil Co., 841 F. Supp. 962, 972 (C.D. Cal. 1993) (rejecting defendant's "act of war" defense). Like the "act of God" defense, the "act of war" defense remains relatively untested. *See generally* Martin A. McCrory, *The Equitable Solution to Superfund Liability: Creating a Viable Allocation Procedure for Businesses at Superfund Sites*, 23 VT. L. REV. 59, 79 (1998) (noting the lack of cases dealing with the "act of war" provision).

40. *See* 42 U.S.C. § 9607(b)(3) (1994). This provision has proven the most valuable of CERCLA's limited defenses; however, even defendants that rely on it are hindered by three substantial limitations: (1) a contractual relationship between the defendant and the polluter negates the defense, (2) the defendant must show that the third party is the sole cause of the harm, and (3) the defendant must show that he exercised due care and took reasonable precautions against potential harm caused by foreseeable acts of the third party. *See* McCrory, *supra* note 39, at 79-80.

41. *See* 42 U.S.C. § 9607(a)(1)&(2) (1994). See *supra* note 5 for the full text of these provisions.

42. *See* United States v. Bestfoods, 524 U.S. 51, 64-65 (1998).

43. 524 U.S. 51 (1998).

44. *Id.* at 65. This nefarious, fictitious character could be held liable under

important because the determination of whether a party is an operator could determine whether or not the court will impose liability.

Despite the importance of the term "operator," courts generally agree that the statute provides little or no guidance regarding its meaning.[45] Section 101(20)(a) of CERCLA simply defines the "owner or operator" of an on-shore facility as:

> (ii) . . . any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of state or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand.[46]

In addition, legislative history sheds little light on the matter. Like many of CERCLA's provisions, the legislative history surrounding the term "operator" has been criticized frequently for being circular, vague, and practically useless.[47]

In situations where one party is both the owner and the operator of a facility, the task of determining operatorship is relatively easy.[48] However, the task becomes infinitely more difficult when

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§ 9607(a)(2), which provides liability for anyone who operates a facility at the time a release of hazardous materials takes place. *See* 42 U.S.C. § 9607(a)(2) (1994). Although Justice Souter made this comment before actually discussing what types of activities could result in operator liability, he is clearly revealing his view of the broad implications of the *Bestfoods* Court's operator liability test. For the *Bestfoods* test, see *infra* text accompanying note 209.

45. *See* United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 578 (D. Md. 1986) (stating "the structure of section 107(a), like so much of this hastily patched together compromise Act is not a model of statutory clarity"); *see also Bestfoods*, 524 U.S. at 66 (stating "[w]e may again rue the uselessness of CERCLA's definition of a facility's 'operator' as 'any person . . . operating' the facility") (citation omitted); United States v. Kayser-Roth Corp., 724 F. Supp. 15, 19 (D.R.I. 1989) (stating that "CERCLA's definition of 'owner or operator' is not especially illuminating"), *aff'd*, 910 F.2d 24 (1st Cir. 1990).

46. 42 U.S.C. § 9601(20)(A) (1994).

47. *See* Williamson & McCann, *supra* note 4, at 411-12 (noting that what little legislative history does exist on "operator" liability is, like the wording of the statute itself, circular) (quoting H.R. REP. NO. 96-172, pt. 1, at 37, *reprinted in* 1980 U.S.C.C.A.N. 6160, 6182, which defines operator as a person "carrying out operational functions for the owner of the facility pursuant to an appropriate agreement"); *see also* Dedham Water Co. v. Cumberland Farms Dairy, 805 F.2d 1074, 1081 (1st Cir. 1986) (noting that the court was unable to glean anything from legislative history other than the statute's broad remedial purpose, and stating that "CERCLA's legislative history is shrouded with mystery").

48. For example, if an independent corporation owns and carries out the daily operations of a facility there is little question that the corporation would be liable as an operator. *See, e.g.*, Williamson & McCann, *supra* note 4, at 409-10.

two or more parties share control of the facility.[49] Two or more parties sharing control of a facility is prevalent in the context of a parent corporation's control of a subsidiary and government control of privately-owned facilities.[50] In those cases, the courts have focused on the degree of "actual control"[51] required to make a party an operator.[52] Government and parent corporation operator liability share a common lineage which the following section will discuss.

C. *"Actual Control" in the Parent Corporation and Government Contexts*

"Actual control" is a broad, nebulous term that nonetheless manages to generally reflect the equally broad and nebulous state of CERCLA operator liability. The phrase was first used by the United States Court of Appeals for the Eighth Circuit[53] and has been repeated frequently by the courts discussed in this Part. Generally, "actual control" refers to the proposition that a parent corporation or government agency must exercise some degree of direct control over a facility to be held liable for a release.[54]

However, the "actual control" test was not always the established law. For some time the courts flirted with alternative tests requiring that, to be an operator, a parent corporation only needed

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49. For example, when a subsidiary corporation owns and carries out the daily operations of a facility there remains the question of how much influence the parent corporation had over the actions of the subsidiary in running the facility. *See, e.g.*, Williamson & McCann, *supra* note 4, at 410 (noting that when more than one party could be construed as an operator liability can attach to each operator that meets the appropriate criteria).

50. In the parent corporation context, control of the facility in question may be shared by the owning corporation and the parent corporation. In the government context, control may be shared by the owning corporation and a government body (through regulation or direct supervision). See *infra* Part I.C for a discussion of the tests that have evolved to evaluate liability in these contexts.

51. The "actual control" test holds a corporation liable for the violations of another corporation if it exercised "substantial control" over the other corporation. *See* FMC Corp. v. United States Dep't of Commerce, 29 F.3d 833, 843 (3d Cir. 1994) (en banc) (citing Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209, 1221 (3d Cir. 1993)).

52. *See, e.g.*, *FMC Corp.*, 29 F.3d at 845-46 (holding the federal government liable for contamination emanating from a privately-owned, but government-controlled, facility); Rockwell Int'l Corp. v. IU Int'l Corp., 702 F. Supp. 1384, 1390-91 (N.D. Ill. 1988) (establishing a number of factors to be considered when determining whether a parent corporation can be held liable for waste disposed of by a subsidiary).

53. *See* United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 743 (8th Cir. 1986) (stating that the defendant "had actual 'control' over the NEPACCO plant's hazardous substances").

54. *See supra* note 51.

to have the authority to control a facility, regardless of whether or not such control was actually exercised.[55] In a leading case, *United States v. Fleet Factors Corp.*,[56] the Eleventh Circuit held that a secured creditor (not a parent corporation) could be held liable if it was "participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes."[57] However, this "authority-to-control" test has fallen into disfavor among the courts, many of which have weighed authority-to-control against actual control and chosen the latter.[58] Other courts have implicitly rejected the authority-to-control test by requiring affirmative acts on the part of the parent corporation or governmental body.[59]

The viability of the actual control test appears to be assured now that the Supreme Court has adopted it in *United States v. Bestfoods*.[60] The remainder of this Note examines the origin of the "actual control" test and the competing theories of how it should be applied to government operator liability.

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55. *See, e.g.,* Nurad, Inc. v. William E. Hooper & Sons, Co., 966 F.2d 837, 842 (4th Cir. 1992) (stating that authority to control, even when there is no actual control, subjects a parent corporation to liability); *see also* United States v. Carolina Transformer Co., 978 F.2d 832, 836-37 (4th Cir. 1992) (following the *Nurad* holding).

56. 901 F.2d 1550 (11th Cir. 1990).

57. *Id.* at 1557.

58. *See* United States v. Gurley, 43 F.3d 1188, 1193 (8th Cir. 1994) (holding that "an individual may not be held liable as an 'operator' . . . unless he or she (1) had authority to determine whether hazardous wastes would be disposed of and to determine the method of disposal and (2) actually exercised that authority"); Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209, 120-21 (3d Cir. 1993) (holding that "the district court, by applying the 'actual control' test, applied the correct legal standard with respect to the operator liability issue"); United States v. Kayser-Roth Corp., 910 F.2d 24, 27 (1st Cir. 1990) (stating that "[t]o be an operator requires more than merely complete ownership and the concomitant general authority or ability to control that comes with ownership").

59. *See* United States v. USX Corp., 68 F.3d 811, 822 (3d Cir. 1995) (requiring "substantial control" over a facility to be held liable); Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Cal. Living Trust, 32 F.3d 1364, 1367 (9th Cir. 1994) (explaining that "a party must do more than stand by and fail to prevent the contamination. It must play an active role in running the facility, typically involving hands-on, day-to-day participation in the facility's management"). Only the Fourth Circuit in *Nurad* has failed to retreat from its position favoring the authority-to-control test. *See Nurad, Inc.*, 966 F.2d at 842.

60. 524 U.S. 51 (1998). The Supreme Court specifically stated that an operator is "someone who directs," not someone with authority to direct. *See id.* at 66. For further discussion of the *Bestfoods* decision and its implications, see *infra* Part II.A.

1. Parent Corporation Operator Liability: Development of the Traditional Multi-Factor Tests

Prior to *Bestfoods*, lower courts relied upon extensive, fact-intensive tests to determine whether a parent corporation had sufficient control over a facility to be considered an operator.[61] Various courts' liability tests have been divergent in their use of specific criteria; however, there was a common theme. Generally, a defendant was considered an operator if it exercised control over a facility's operations, personnel, and finances (or some combination of the three).[62]

Due to the lack of statutory or legislative guidance regarding CERCLA operator liability, the first appellate courts to consider operator liability began looking to cases decided under the Clean Water Act ("CWA"), which has a definition of "operator" identical to CERCLA's.[63] One commonly cited decision under the CWA is *Apex Oil Co. v. United States*,[64] in which the United States Court of Appeals for the Eighth Circuit based liability upon three primary factors: (1) control over the people and mechanisms that caused the contamination, (2) the ability to stop or reduce the pollution, and (3) ability to know of the contaminating release.[65]

The courts in *United States v. Northeastern Pharmaceutical & Chemical Co.*[66] and *Idaho v. Bunker Hill Co.*[67] expressly adopted the *Apex Oil* CWA standard in the CERCLA context.[68] Similarly,

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61. See *infra* this Part for a discussion of these tests and their development.

62. This categorization of the traditional multi-factor operator tests is my own. The courts have applied various factors, presented with different levels of specificity. These courts' holdings will be discussed in this section. A synthesized test of specific factors advocated by the various courts would be unreasonably long and complex. However, the following discussion will show that the factors applied by the various courts fall generally into the framework of operational/personnel/financial control.

63. See 33 U.S.C. § 1321(a)(6) (1994), which states, "'owner or operator' means . . . (B) . . . any person owning or operating such . . . facility." *See* Idaho v. Bunker Hill Co., 635 F. Supp. 665, 672 (D. Idaho 1986) (expressly naming the CWA test as applicable in the CERCLA context); United States v. Conservation Chem. Co., 628 F. Supp. 391, 417 (W.D. Mo. 1985) (supplemental mem. op.) (expressly adopting the CWA test and citing to *Apex Oil Co. v. United States*, 530 F.2d 1291 (8th Cir. 1976), as analogous); United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823, 848-49 (W.D. Mo. 1984) (holding corporate officer liable on the basis of factors used in CWA test), *aff'd in relevant part, rev'd in part on other grounds*, 810 F.2d 726 (8th Cir. 1986).

64. 530 F.2d 1291 (8th Cir. 1976).

65. *See id.* at 1293.

66. 579 F. Supp. 823 (W.D. Mo. 1984).

67. 635 F. Supp. 665 (D. Idaho 1986).

68. *See Bunker Hill Co.*, 635 F. Supp. at 672 ("The court believes that the [*Apex Oil* test, as adopted by the *Northeastern* court,] . . . may properly be employed to deter-

the court in *United States v. Carolawn Co.*[69] adopted the CWA standard in a CERCLA context by reference to *Northeastern*.

Although retaining the basic standard that an operator must have some type of control, the actual control "operator" test was further refined in *Colorado v. Idarado Mining Co.*[70] The *Idarado* court recognized the *Northeastern* standard, and also examined such additional factors as stock ownership, control over marketing, authority to execute contracts for the subsidiary, and control over personnel actions.[71] The *Idarado* court held a parent corporation and a wholly-owned personnel services subsidiary liable for pollution caused by a subsidiary mining operation.[72] Specifically, the court held Newmont Mining Corporation, the parent corporation of Idarado, liable on the basis of stock ownership, the ability of Newmont to execute contracts for Idarado, a high degree of overlap between the officers of the Idarado Mine and Newmont, and the application of Newmont's personnel policies to Idarado.[73] In short, the court found that the parent corporation was "intimately" and pervasively involved in the management of the Idarado Mine.[74] Therefore, the court held that the Newmont Mining Corporation was an "operator" under CERCLA.[75]

A noteworthy development in *Idarado* was the addition of a broad new element to the actual control test. The court remained faithful to the CWA standard by adopting the elements of personnel and operational control (specifically relating to pollution).[76] However, the court also discussed contractual control and stock

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mine when a parent corporation becomes an owner or operator with respect to a subsidiary's facilities."); *Northeastern Pharm. & Chem. Co.*, 579 F. Supp. at 848 (stating "this Court considers the Eighth Circuit's [CWA test] analysis significant in defining an employee's liability under CERCLA").

69. [1984] 14 Envtl. L. Rep. (Envtl. L. Inst.) 20,699, 20,700 (D.S.C. 1984) (adopting the CWA test, as applied in *Northeastern*).

70. [1988] 18 Envtl. L. Rep. (Envtl. L. Inst.) 20,578, 20,578 (D. Colo. Apr. 29, 1987) (stating that in *Northeastern*, "[T]he court adopted, for the purposes of determining liability under CERCLA, the definition of 'person in charge' as that phrase is used in the Federal Water Pollution Control Act").

71. *See id.* at 20,578-79 (drawing heavily on a general discussion of these factors in *United States v. Conservation Chem. Co.*, 628 F. Supp. 391, 416-17 (W.D. Mo. 1985) (supplemental mem. op.), in which the district court held a corporate officer liable under CERCLA based on the CWA test factors).

72. *See id.* at 20,579.

73. *See id.* at 20,578.

74. *See id.* at 20,579.

75. *See id.*

76. *See id.* at 20,578. See *supra* text accompanying note 65 for the CWA formulation of these factors.

ownership and then added a third factor—participation in the financial decisions of the facility, or, financial control.[77] Thus, the new test that emerged required control over the facility's personnel, operations, and finances.

Less than a year later, the court in *Rockwell International Corp. v. IU International Corp.*,[78] without citing to *Idarado*, effectively adopted the test advocated in that case.[79] In *Rockwell*, Rockwell purchased the facility in question from a subsidiary of IU and later found contaminants on the facility's property.[80] Rockwell initiated monitoring and testing procedures at the site and brought suit against IU to recover costs and to obtain a declaratory judgment that IU would be responsible for any future cleanup costs.[81] The court denied IU's motion for summary judgment and held that there was sufficient evidence to find that IU could have been considered an operator.[82] In reaching its decision, the court listed a number of relevant factors, including the hiring of personnel and determination of their duties, creation and enforcement of operating plans and guidelines, active participation in waste disposal policy, and review of requests for equipment purchases.[83] Although the *Rockwell* court did not specifically refer to the *Idarado* formulation of the actual control test, the factors it discussed fell within the *Idarado* formula: personnel control (IU appointed officers for the subsidiary), operational control (IU officers established and monitored compliance with operational guidelines, specifically those regarding disposal of waste), and financial control (IU officials reviewed recommendations for the purchase of equipment).[84]

The United States Court of Appeals for the Seventh Circuit in *Edward Hines Lumber Co. v. Vulcan Materials Co.*[85] also adopted the *Idarado* factors.[86] Hines and Mid-South Wood Products, a subsequent purchaser of the Hines facility, sued Osmose Wood Preserving, a chemical supplier that built a portion of the facility used for chemically treating wood, to recover cleanup costs.[87] The court

77. *See Idarado*, [1988] 18 Envtl. L. Rep. (Envtl. L. Inst.) at 20,578-79.
78. 702 F. Supp. 1384 (N.D. Ill. 1988).
79. *See id.* at 1390-91.
80. *See id.* at 1386.
81. *See id.*
82. *See id.* at 1390.
83. *See id.* at 1390-91.
84. *See id.*
85. 861 F.2d 155 (7th Cir. 1988).
86. *See id.* at 157-58.
87. *See id.* at 155-56.

determined that Hines, and not Osmose, was the operator at the time the contamination occurred.[88] In making this determination, the court noted that Hines hired employees (personnel control), regulated production (operational control, albeit not relating to waste disposal), and determined to whom, and at what price, products would be sold (financial control).[89]

In *United States v. Kayser-Roth Corp.*,[90] the United States Court of Appeals for the First Circuit applied factors similar to those in *Idarado* and reaffirmed the importance of control over waste disposal policy.[91] The United States brought suit under CERCLA against Kayser-Roth for the cost of cleanup operations necessitated by the actions of Stamina Mills, a wholly-owned, but then defunct, subsidiary of Kayser-Roth.[92] The First Circuit affirmed the district court's determination that Kayser-Roth was an operator of the facility.[93] The First Circuit noted the parent's "pervasive control" over Stamina Mills—control that satisfied all three elements of the *Idarado* test.[94] The court listed numerous ways in which Kayser-Roth influenced Stamina Mills' personnel and financial actions, but it paid special attention to Kayser-Roth's control over environmental policy.[95] Specifically, the court found that Kayser-Roth approved the installation of a cleaning system that used potentially dangerous chemicals and that Kayser-Roth controlled the methods used for disposal of those chemicals.[96]

In 1993, the United States Court of Appeals for the Third Circuit adopted the actual control test in *Lansford-Coaldale Joint Water Authority v. Tonolli Corp.*[97] In *Lansford-Coaldale*, Tonolli Canada created a wholly-owned subsidiary, Tonolli PA, to operate a smelting facility in Pennsylvania.[98] The parent corporation, IFIM,

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88. *See id.* at 158.

89. *See id.*

90. 910 F.2d 24 (1st Cir. 1990).

91. *See id.* at 27-28. The line of previously discussed cases firmly established that control over waste disposal policy was essential; however, the *Hines* court conspicuously, but only temporarily, broke this chain by failing to address this point. Instead the court of appeals found it notable that Hines had simply "decid[ed] how much to produce." *Hines*, 861 F.2d at 159.

92. *See Kayser-Roth Corp.*, 910 F.2d at 25.

93. *See id.* at 28.

94. *See id.* at 27.

95. *See id.* at 27-28.

96. *See id.*

97. 4 F.3d 1209, 1220-21 (3d Cir. 1993).

98. *See id.* at 1213.

later purchased both Tonolli Canada and Tonolli PA.[99] After a Water Authority study showed an impending contamination from the smelting facility, the Authority brought suit against IFIM, Tonolli Canada, and Tonolli PA to recover future CERCLA cleanup costs.[100] The *Lansford-Coaldale* court upheld the applicability of the actual control test but remanded for further findings of fact regarding the roles played by certain officers.[101] The Third Circuit stated that operator liability is "reserved for those situations in which a parent or sister corporation is deemed, due to the specifics of its relationship with its affiliated corporation, to have had substantial control over the facility in question."[102] Significantly, the court noted that there are no decisive factors in determining operator liability, but that courts must look to the "totality of the circumstances."[103] However, in creating a list of relevant factors for the district court to consider, the Third Circuit listed issues that fit neatly into the categories of personnel, operational, and financial control.[104]

Thus, throughout the history of CERCLA operator liability, the actual control test established by *Idarado* and *Northeastern* appeared frequently in the context of parent corporation operator liability with varying weight given to the different factors.[105] Despite the courts' wide-spread divergence, a general pattern developed showing emphasis on the factors of personnel, financial, and operational control.

2. Government Operator Liability

a. Statutory and judicial justifications for imposing government liability

Under CERCLA, governmental bodies may be held liable as operators. Such liability is indicated expressly in CERCLA's lan-

99. *See id.* at 1213.

100. *See id.* The Water Authority dropped Tonolli PA from the suit because the company went bankrupt. *See id.*

101. *See id.* at 1222.

102. *Id.* at 1220.

103. *See id.* at 1222.

104. The "critical questions" that the district court needed to consider were control of day-to-day operations, the sharing of corporate officers, authority held by those officers, and control over the release of hazardous substances. *See id.* at 1222-24.

105. *See* United States v. USX Corp., 68 F.3d 811, 814 (3d Cir. 1995) (focusing on participation in liability-creating activities); United States v. Gurley, 43 F.3d 1188, 1193 (8th Cir. 1994) (focusing on control over disposal of waste); Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund, 25 F.3d 417, 421-22 (7th Cir. 1994) (emphasizing the importance of control over waste disposal and personnel actions).

guage and has been upheld by the courts.[106] A statutory "person" under CERCLA includes the "United States Government, State, municipality, commission, political subdivision of a State, or any interstate body,"[107] and operator liability is predicated on actions taken by a "person."[108] In addition, the Supreme Court's decision in *Pennsylvania v. Union Gas Co.*[109] solidified the possibility of government liability.[110] Thus, there is clear historical support for government operator liability.

The outer boundaries of government operator liability are fairly well-defined. In situations where the government owns a facility that is staffed with government personnel, there is little question that the governmental body would be liable as an operator in the event of a release of hazardous substances.[111] Control would be so pervasive as to leave little room for argument that the govern-

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106. See *infra* text accompanying note 107 for CERCLA language authorizing government liability. However, courts have been reluctant to actually subject non-owner government bodies to operator liability. *See, e.g.*, United States v. Vertac Chem. Corp., 46 F.3d 803, 809 (8th Cir. 1995) (finding the government not liable); United States v. Dart Indus., 847 F.2d 144, 146 (4th Cir. 1988) (recognizing, for the first time, the possibility of government operator liability based upon control of a civilian facility, but declining to hold the state liable); Washington v. United States, 930 F. Supp. 474 (W.D. Wash. 1996) (finding the government not liable despite overwhelming indicia of control over the facility in question); United States v. Iron Mountain Mines, Inc., 881 F. Supp. 1432, 1449-51 (E.D. Cal. 1995) (finding the government not liable despite presence of significant indicia of control over facility). *But see* FMC Corp. v. United States Dep't of Commerce, 29 F.3d 833, 845-46 (3d Cir. 1994) (en banc) (finding the federal government liable for activities at chemical plant during World War II); United States v. Stringfellow, [1990] 20 Envtl. L. Rep. (Envtl. L. Inst.) 20,656, 20,658 (C.D. Cal. Jan. 9, 1990) (finding the state liable based upon indicia of control). See *infra* this Part for an in-depth discussion of the rationales used by these courts to avoid government liability.

107. 42 U.S.C. § 9601(21) (1994).

108. *See id.* § 9607(a).

109. 491 U.S. 1 (1989).

110. In *Union Gas*, the Court affirmed the court of appeal's holding that Congress abrogated State sovereign immunity with respect to CERCLA. *See id.* at 6. This specific holding of *Union Gas* was overruled by *Seminole Tribe v. Florida*, 517 U.S. 44, 66 (1996), in which the Supreme Court limited the potential for private party suits against States that refuse to consent on Eleventh Amendment grounds. However, as the concurrence in *United States v. Township of Brighton*, 153 F.3d 307 (6th Cir. 1998), noted, *Seminole Tribe* would not apply in suits brought by the United States. *See id.* at 323 n.2 (Moore, J., concurring). This issue of the breadth of sovereign immunity under CERCLA remains unsettled and is outside the scope of this Note.

111. *See FMC Corp.*, 29 F.3d at 849 (Sloviter, C.J., dissenting) (stating that "when the government undertakes to respond to society's problems through operation of its own facilities . . . its activities are analogous to those of private parties, and it is consequently subject to 'operator' liability under CERCLA"). *See, e.g.*, Daigle v. Shell Oil Co., 972 F.2d 1527, 1537-43 (10th Cir. 1992) (examining the possibility of government liability for contamination at a hazardous waste surface impoundment facility).

ment was not operating the facility. On the opposite end of the spectrum, few would argue that the government should be held liable for actions taken during the cleanup of another party's already contaminated site.[112] By undertaking the remedial action, the government would be acting only in its regulatory capacity, and thus not as an operator. However, as the following discussion will show, the appropriate test for liability arising from the gray area between these extremes is far from resolved.

b. Importation of the "actual control" standard into the government operator context

The first opportunity for a federal appeals court to apply the actual control test to a government actor arose in *United States v. Dart Industries, Inc.*[113] In *Dart*, the United States sought reimbursement for cleanup costs from private parties and companies who allegedly generated hazardous waste materials found in an abandoned waste site.[114] Those defendants then filed a third party complaint against the South Carolina Department of Health and Environmental Control ("DHEC"), claiming that it was an operator and that it negligently issued permits for waste disposal at the site and failed to install monitoring wells as it had promised.[115] The Fourth Circuit held that DHEC was not an operator, noting that it had simply exercised its statutory duty of "loosely regulat[ing]" the facility after it had been abandoned by its previous owners.[116] The court refrained from any detailed discussion of what would make the state an operator.[117] Although it did not cite any corporate operator liability cases, the Fourth Circuit stated that a finding of liability would have to be predicated on "hands on" activities at the facility, noting that there was no allegation that the state had any active participation in the activities that created the waste or contributed to its release.[118]

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112. Indeed, CERCLA specifically states that "[n]o State or local government shall be liable . . . for costs or damages as a result of actions taken in response to an emergency created by the release . . . of a hazardous substance generated by or from a facility owned by another person" short of "gross negligence" or "intentional misconduct." 42 U.S.C. § 9607(d)(2) (1994).

113. 847 F.2d 144 (4th Cir. 1988). Note that the Fourth Circuit decided *Dart* a year before the Supreme Court gave its express approval of state liability for monetary damages in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 6 (1989).

114. *See Dart Indus., Inc.*, 847 F.2d at 145.

115. *See id.*

116. *See id.* at 146.

117. *See id.*

118. *See id.*

The following year, in *United States v. New Castle County*,[119] a federal district court expanded on the vague actual control test used in *Dart*, giving a detailed list of factors that courts should consider when determining liability.[120] *New Castle* concerned a "model landfill site" in which the State of Delaware took some degree of interest.[121] Delaware was involved in various aspects of the landfill's planning and operation.[122] When the United States brought suit against various defendants for cleanup of the site, the defendants brought a third party CERCLA complaint against the state.[123] The district court declined to hold the state liable since Delaware had simply acted "as protector of the health, safety and welfare of its citizens . . . with[out] any proprietary or financial interests at stake."[124] However, the court did recommend a list of factors to consider when deciding whether to impose operator status:

> The Court should inquire, *inter alia*, into whether the person sought to be strapped with operator status controlled the finances of the facility; managed the employees of the facility; managed the daily business operations of the facility; was responsible for the maintenance of environmental control at the facility; and conferred or received any commercial or economic benefit from the facility, other than the payment or receipt of taxes.[125]

The *New Castle* formulation of the actual control test represents an adoption of the factors applied by courts in the corporate context, but with the added element of economic gain, which would be likely to remove a majority of potential government operators from the scope of CERCLA liability.[126]

In the same year that *New Castle* was decided, the district court in *CPC International, Inc. v. Aerojet-General Corp.*[127] expressly

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119. 727 F. Supp. 854 (D. Del. 1989).

120. *See id.* at 869.

121. *See id.* at 862.

122. *See id.* The state aided in "site selection, planning, design, operations and determining the types of wastes suitable for disposal at the Site." *Id.* In addition, the state "required the submission of detailed information about the Site, its surrounding area and proposed procedures for the operation of the Site." *Id.* The State Board of Health also monitored the site frequently. *See id.* at 863.

123. *See id.* at 857.

124. *Id.* at 866.

125. *Id.* at 869. The court noted that this list was not to be read as exhaustive, but as "part of a *para materia* inquiry in determining operator status." *Id.*

126. Although it is conceivable that a government agency could choose to operate a facility of profit, none of the actors in the cases this Note discusses had such a motive.

127. 731 F. Supp. 783 (W.D. Mich. 1989).

adopted the *Apex* CWA test[128] in the government operator context. CPC Int'l and Aerojet sought to recover response costs[129] from the Michigan Department of Natural Resources ("MDNR").[130] CPC Int'l claimed that MDNR had agreed to operate purge wells at the site in question and provide local residents with an alternate water supply, which it failed to do.[131] There was some question as to whether MDNR had promised to operate the purge wells. However, the court noted that, if it had, MDNR's apparent nonfeasance did not protect it from liability.[132] The *Aerojet* court found actual control by characterizing MDNR's assumption of control as an affirmative act.[133] Thus, the *Aerojet* court denied MDNR's motion to dismiss.[134] MDNR also argued that holding government bodies lia-

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128. *See id.* at 788 (citing United States v. Mobil Oil Corp., 464 F.2d 1124, 1127 (5th Cir. 1972), adopted in Apex Oil Co. v. United States, 530 F.2d 1291, 1293 (8th Cir. 1976)). The *Aerojet* case falls somewhat outside the mainstream of actual control test jurisprudence because one could read the opinion as advocating an authority-to-control test. See *supra* text accompanying note 65 for the *Apex* text. The *Aerojet* court quoted language adopted in *Apex* that tends to indicate the authority test. See *supra* notes 55-57 and accompanying text for a discussion of the authority-to-control test. However, the *Aerojet* court also quoted language from *Dart* that seems to indicate an actual control requirement: "The generators are unable to specify any 'hands on' activities by [the defendant] that contributed to the release of hazardous wastes." *Aerojet-General Corp.*, 731 F. Supp. at 788 (quoting United States v. Dart Indus., Inc., 847 F.2d 144, 146 (4th Cir. 1988)). In any event, the *Aerojet* court was never clear as to which test it was using. Still, the important issue is the multi-factor test the *Aerojet* court advocated, particularly considering that the Sixth Circuit later expressly rejected the authority-to-control test. *See* United States v. Township of Brighton, 153 F.3d 307, 314 (6th Cir. 1998) (rejecting the authority-to-control test). It is also important to note that the *Aerojet* court failed to make mention of *New Castle* or the economic gain factor that the *New Castle* court imposed.

129. CERCLA defines "response" as "removal, remedy, and remedial action." 42 U.S.C. § 9601(25) (1994). The statute defines "removal" as "the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment . . . ." *Id.* § 9601(23). "Remedy" and "remedial action" are defined as:

> [T]hose actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment.

Id. § 9601(24).

For further discussion of CERCLA's response cost recovery infrastructure, see *supra* notes 24-25.

130. *See Aerojet-General Corp.*, 731 F. Supp. at 785.

131. *See id.* at 786.

132. *See id.* at 788.

133. *See id.* at 788-89.

134. *See id.* at 792.

ble creates a "disincentive for undertaking remedial actions."[135] However, the *Aerojet* court emphasized CERCLA's broad remedial purpose, implying that the importance of holding responsible parties liable may outweigh the policy against avoiding government liability.[136]

The following year, in *United States v. Stringfellow*,[137] a California district court held a government actor liable under CERCLA for the first time.[138] The court based liability on the fact that the state hired employees for the facility, made operational decisions, actively controlled waste disposal at the site, opened and closed the site, and regulated who could dump and what could be dumped at the facility.[139]

Four years later, in the landmark case *FMC Corp. v. United States Department of Commerce*,[140] the Third Circuit held the federal government liable as an operator for its actions during World War II at a manufacturing facility owned by the American Viscose Corporation ("AVC").[141] The plant was one of the few in the country that produced high tenacity rayon, a material pivotal to the American war effort.[142]

The government, under the auspices of the War Production Board, Textile, Clothing and Leather Division, ("WPB"), instructed AVC to expand and increase its production of high tenacity rayon, and would, in fact, have seized the factory if AVC was unable to meet the WPB's standards.[143] In order to help AVC facilitate this expansion, the government, through the Defense Plant Corporation ("DPC"), provided AVC with leased government-owned equipment and machinery and hired a third party, Rust Engineering Company ("Rust"), to design and install the equipment.[144] In addition, through its contract with Rust, the DPC regulated the

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135. *Id.* at 791.

136. *See id.* See *infra* Part III for a further discussion of the policies for and against government liability.

137. [1990] 20 Envtl. L. Rep. (Envtl. L. Inst.) 20,656 (C.D. Cal. Jan. 9, 1990).

138. *See id.* See *supra* note 106 for discussion of courts' theoretical approval and practical reticence regarding government liability. Also note that although the *Aerojet* court denied the government's motion to dismiss, judgment was not actually rendered against the government. *See Aerojet-General Corp.*, 731 F. Supp. at 792.

139. *See Stringfellow*, [1990] 20 Envtl. L. Rep. (Envtl. L. Inst.) at 20,658.

140. 29 F.3d 833 (3d Cir. 1994).

141. *See id.* at 843-44. AVC later sold the property to FMC Corp., the plaintiff in this case. *See id.* at 835.

142. *See id.* at 836.

143. *See id.*

144. *See id.* at 837.

purchase of supplies, created operating plans for the facility, and had the authority to remove the contractor's employees from the facility.[145] The DPC also installed a full-time representative at the facility to monitor and supervise Rust's employees.[146]

To provide a steady stream of raw materials to the plant, the government built and maintained a sulfuric acid plant adjacent to the AVC facility and contracted with a third party to build a carbon bisulfide plant in the area.[147] The government required AVC to accept the materials from these facilities.[148] When the government decided the workforce at the AVC plant was inadequate, it provided draft deferments to employees, recruited employees from other industries, housed the incoming workers, and managed and supervised the plant's employees.[149] To facilitate this new initiative, the WPB assigned a full-time personnel manager to the facility.[150] The government also regulated the supply and price of materials flowing in and out of the factory.[151] As a result, the government became aware that the production of high tenacity rayon created a great deal of waste, and "personnel present at the facility witnessed a large amount of highly visible waste disposal activity."[152]

In 1982, testing of the area's groundwater revealed dangerous chemicals that had been used in rayon production.[153] Subsequently, the EPA initiated cleanup operations and sought to recover the cost from FMC, which in turn filed suit against the United States Department of Commerce, claiming that the federal government was liable as an operator.[154]

The *FMC* court held the federal government liable for cleanup costs as an operator[155] and arranger.[156] In finding operator liability,

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145. *See id.*
146. *See id.*
147. *See id.*
148. *See id.*
149. *See id.*
150. *See id.*
151. *See id.*
152. *Id.* at 837-38.
153. *See id.* at 835.
154. *See id.*
155. *See id.* at 845.
156. Arranger liability is predicated upon 42 U.S.C. § 9607(a)(3) (1994), which imposes liability upon "any person who by contract, agreement, or otherwise arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person . . . ." *Id.* Since the *FMC* court was divided on the issue of arranger liability, and the issue of operator liability had already been settled, the court simply affirmed the lower court's judgment on arranger liability without discussion. *See FMC Corp.*, 29 F.3d at 846.

the Third Circuit first adopted, in the government context, the actual control test it had applied a year earlier in the parent corporation context.[157] This test emphasized control of day-to-day operations, the sharing of corporate officers, and control over the release of hazardous substances.[158] In further defining this test, the *FMC* court cited the tests applied by the courts in *United States v. New Castle County*[159] and *Colorado v. Idarado Mining Co.*[160] However, the court independently announced a list of what it called the "leading indicia of control": control over items in production, levels of production, the product's price, and customers to whom the facility's owner sold the product.[161] Applying these factors, as well as those from *Idarado*[162] and *New Castle*,[163] to the facts of *FMC*, the Third Circuit found that the government had sufficient control of the facility to hold the United States liable as an operator.[164] Specifically, the court cited findings that the government had controlled the facility's raw materials, built and sanctioned the building of neighboring plants to support the AVC facility, created and maintained a workforce for the plant, managed the personnel, and controlled the product's price and market.[165]

The Third Circuit distinguished *FMC* from *Dart* and *New Castle*, cases in which the courts did not find sufficient government control,[166] noting that, in *Dart*, the state had neither financial nor

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157. *See FMC Corp.*, 29 F.3d at 843 (stating that using the actual control test to impose liability is inconsistent with "'traditional rules of limited liability for corporations,'" but nevertheless is consistent with "CERCLA's broad remedial purposes") (quoting Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209, 1221 (3d Cir. 1993)).

158. *See Lansford-Coaldale Joint Water Auth.*, 4 F.3d at 1222-24.

159. 727 F. Supp. 854 (D. Del. 1989); *see also FMC Corp.*, 29 F.3d at 843. The *New Castle* court emphasized financial control, employee management, control over daily business operations, control over maintenance of environmental controls, and commercial or economic benefit received by the defendant. *See New Castle County*, 727 F. Supp. at 869. See *supra* text accompanying note 125 for the *New Castle* formulation of the actual control test.

160. [1988] 18 Envtl. L. Rep. (Envtl. L. Inst.) 20,578 (D. Colo. Apr. 29, 1987); *see also FMC Corp.*, 29 F.3d at 843-44. The *Idarado* court emphasized stock ownership, the ability of the defendant to execute contracts for the facility, a high degree of overlap between the officers of the parent and subsidiary, and the application of the parent's personnel policies to the subsidiary. *See Idarado Mining Co.*, [1988] 18 Envtl. L. Rep. (Envtl. L. Inst.) at 20,578. See *supra* text accompanying note 73 for the *Idarado* test.

161. *See FMC Corp.*, 29 F.3d at 843.

162. *See supra* note 160.

163. *See supra* note 159.

164. *See FMC Corp.*, 29 F.3d at 843.

165. *See id.*

166. *See id.* at 843-44.

operational control over the facility.[167] In addition, the *FMC* court found it significant that in neither *Dart* nor *New Castle* did the government produce a product for its own use, as occurred in *FMC*.[168]

The following year, in *United States v. Vertac Chemical Corp.*,[169] the Eighth Circuit relied heavily on *FMC* in declining to impose government liability.[170] During the 1950's the facility in question produced a number of chemical herbicides.[171] In 1961, Hercules, Inc. purchased the facility and subsequently won a government contract to make the chemical herbicide known as Agent Orange for use in Vietnam.[172] In conjunction with this contract, the government designated Agent Orange production by Hercules a "rated order," to take precedence over any of Hercules' other contracts.[173] The terms of the government contract were substantially dictated by the Department of Defense.[174] In addition, the contract subjected Hercules to government-created health and safety standards, which were enforced by random inspections.[175]

After repeated demands by the United States government that Hercules increase production, the government facilitated the chemical manufacturer's importation of the necessary component chemicals.[176] The government waived import duties for these components and issued a directive to a chemical supplier to ensure that a constant supply of raw materials continued to flow to Agent Orange producers, including Hercules.[177]

The government did not establish or attempt to establish waste disposal policies, and Hercules did not consult government officials on its waste disposal policies.[178] The government eventually discovered contamination, undertook cleanup, and sought cost recovery from the owners and direct operators of the site.[179] The defendants, in response, filed suit against the United States, claiming that

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167. *See id.* at 844.
168. *See id.*
169. 46 F.3d 803 (8th Cir. 1995).
170. *See id.* at 808-09.
171. *See id.* at 806 (noting that at the time, the facility was owned by Reasor-Hill Corp).
172. *See id.*
173. *See id.*
174. *See id.*
175. *See id.* at 806-07. These were required by the Walsh-Healey Act, 41 U.S.C. § 35 (1994). *See id.*
176. *See Vertac Chem. Corp.*, 46 F.3d at 807.
177. *See id.*
178. *See id.*
179. *See id.* These parties included Hercules, Inc.; Vertac Chem. Corp.; Uniroyal

the government was a liable operator.[180]

The Eighth Circuit held that the United States was not liable as an operator[181] or an arranger.[182] Adopting the *FMC* court's use of the actual control test,[183] the court emphasized two factors present in *FMC* that were absent in the present case. First, in *FMC* the government, not the manufacturer, determined the product the facility would produce.[184] Here, Hercules chose to bid on the project.[185] Second, in *FMC* the government "'exerted considerable day-to-day control over American Viscose,'"[186] including extensive management of personnel, a factor which was absent in the present case. No government representative ever "managed or supervised any Hercules personnel."[187]

The same year that the Eighth Circuit decided *Vertac*, a California district court rejected government liability in *United States v. Iron Mountain Mines, Inc.*[188] During World War II, the federal government prohibited gold mining at the Iron Mountain Mine and instead encouraged the mining of copper and zinc by instituting the Premium Price Plan.[189] The owners of the mine entered into a contract that provided the government with all of the mine's output, as well as the power to control the ore's marketing and direct the opening of a new mine.[190] In addition, the government built new roads to the mine, hired employees to work there, gave draft deferments to mine employees, managed the employees by instituting salaries and setting work weeks, and discouraged employees from leaving to work elsewhere.[191] Later, when officials determined that

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Chemical, Ltd.; and the Arkansas Department of Pollution Control and Ecology. *See id.* at 805.

180. *See id.*

181. *See id.* at 809.

182. *See id.* at 811. See *supra* note 156 for an explanation of arranger liability.

183. *See id.* at 808. The *Vertac* court borrowed heavily from *FMC*, quoting the extensive list of factors weighed by the Third Circuit Court of Appeals. *See id.* at 808-09. See *supra* text accompanying note 165 for a list of the *FMC* factors.

184. *See id.* at 809.

185. *See id.*

186. *Id.* (quoting FMC Corp. v. United States Dep't. of Commerce, 29 F.3d 833, 844 (3d Cir. 1994) (en banc)).

187. *Id.*

188. 881 F. Supp. 1432 (E.D. Cal. 1995). This case involved a number of claims against the federal government and the State of California for both operator and arranger liability; however, the operator claim against the federal government is the only claim relevant to this Note.

189. *See id.* at 1436.

190. *See id.*

191. *See id.* at 1449-50.

the mine polluted a local reservoir, the owners brought suit against the government, as an operator, to recover cleanup costs.[192]

Citing *FMC* and *Vertac*, the court declined to hold the government liable as an operator, stating that there was never any "hands-on, day-to-day" control over operations at the facility.[193] According to the *Iron Mountain* court, the government's actions in the present case amounted only to "encouragement and regulation."[194] In particular, the court noted three factors absent in this case that were present in *FMC*: (1) installation of an on-site representative, (2) leasing of, and control over, equipment used at the facility, and (3) direct control over waste disposal.[195]

In *Washington v. United States*,[196] the owner of a shipyard and the State of Washington brought suit against the federal government claiming that it was the operator of a shipyard later found to have caused pollution.[197] The government's involvement with the facility included control and supervision of production by the placement of on-site representatives, participation in the management and supervision of employees, the financing of the facility, control of costs, and knowledge of the hazardous waste production resulting from the facility's operation.[198]

As in *Iron Mountain*, the court relied heavily upon "day-to-day" actual control in its analysis, determining that the government could not be held liable as an operator.[199] This court also analogized heavily to *FMC*; however, as in *Iron Mountain*, the court found the situation to be distinguishable.[200] In *Washington*, the court found four primary distinguishing facts: (1) the absence of the War Production Board, (2) the fact that the shipyard continued to produce the same product while under government control, (3) the fact that the government never exercised its "authority" to seize the plant, and (4) the fact that *FMC* involved nationwide regulations allowing government control.[201]

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192. *See id.* at 1436.

193. *See id.* at 1450 (citation omitted). See *supra* this Part for a discussion of the *FMC* and *Vertac* decisions.

194. *See id.*

195. *Id.*

196. 930 F. Supp. 474 (W.D. Wash. 1996). As previously noted, this Note will focus only on the operator liability claim against the federal government.

197. *See id.* at 475-76.

198. *See id.* at 483-84.

199. *See id.* at 483-85.

200. *See id.* at 485.

201. *See id.*

As can be seen from this review of cases, before the Supreme Court decided *United States v. Bestfoods*,[202] the courts' well-established practice was to apply the multi-factor actual control test in the context of government operator liability. In general, a government operator, like a parent corporation operator, was one that controlled the personnel, operations (particularly regarding waste disposal), and finances of the facility. However, despite these guidelines, no specific set of factors ever emerged, and courts concerned about over-exposing governmental bodies to liability were able to manipulate the existing, inherently malleable tests in order to prevent liability from attaching. The result was that many courts recognized government operator liability as a theoretical possibility, but few actually imposed it.[203]

II. *BESTFOODS* AND BEYOND: THE CURRENT STATE OF GOVERNMENT OPERATOR LIABILITY

A. United States v. Bestfoods: *The Supreme Court Re-Writes the Book—Or Does It?*

In 1998, after roughly 15 years of litigation regarding the proper test to apply for parent corporation operator liability cases, the United States Supreme Court provided a test in *United States v. Bestfoods*.[204] The United States brought suit under CERCLA against, among other subsequent owners, CPC International, the parent corporation of the defunct Ott Chemical Company, to recover the cost of cleanup operations at Ott's facility.[205] In determining whether the parent corporation could be considered an "operator," the Supreme Court closely scrutinized the statutory definition of that term.[206] After examining the common usage of

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202. 524 U.S. 51 (1998).

203. *See* United States v. Vertac Chem. Corp., 46 F.3d 803, 808-09 (8th Cir. 1995) (holding that plaintiffs had not shown sufficient government control to warrant liability); United States v. Dart Indus., Inc., 847 F.2d 144, 146 (4th Cir. 1988) (noting that the government may be held liable as an operator, but that in this case there had been nothing more than regulatory activity undertaken by the state); *Washington*, 930 F. Supp. at 482-85 (recognizing that government liability is possible, but refusing to impose it based on the facts of the case); United States v. Iron Mountain Mines, Inc., 881 F. Supp. 1432, 1450-51 (E.D. Cal. 1995) (refusing to impose liability on the government based upon the facts of the case); United States v. New Castle County, 727 F. Supp. 854, 869-70 (D. Del. 1989) (refusing to impose liability on a state government based upon an extensive list of required control factors).

204. 524 U.S. 51 (1998).

205. *See id.* at 56-58.

206. *See id.* at 66-67.

the word[207] and its context in an "organizational sense,"[208] the Supreme Court settled on the following definition:

> [U]nder CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility. . . . [A]n operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.[209]

The Court also added that, in determining liability, one must consider "whether, in degree and detail, actions directed to the facility by an agent of the parent alone are eccentric under accepted norms of parental oversight of a subsidiary's facility."[210] The Court conspicuously declined to provide any further test by which to evaluate liability. Instead, the Court simply used the vague terms "manage," "direct," and "conduct," which are all subject to varying interpretations. In addition, the Court did not indicate whether this definition applied to government operator liability.

Following the Supreme Court's decision in *Bestfoods*, there has been no clear determination by the lower courts as to whether this definition eliminates the need for additional operator tests.[211] In the parent corporation context, a number of federal district courts have applied the *Bestfoods* definition without any reference to the traditional multi-factor tests.[212] In *Browning-Ferris Industries v. Ter Maat*,[213] the court held a business liable for its actions as an opera-

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207. *See id.* at 66. The Court looked to the dictionary to determine the normal usage of the word, which stated: "'[t]o control the functioning of; run . . . .'" AMERICAN HERITAGE DICTIONARY 1268 (3d ed. 1992), and, "'to work; as, to *operate* a machine.'" WEBSTER'S NEW INT'L DICTIONARY 1707 (2d ed. 1958).

208. *See Bestfoods*, 524 U.S. at 66. The Court stated that the "organizational sense" was more appropriately fitted to the CERCLA context and defined the term as: "'[t]o conduct the affairs of; manage: operate a business.'" AMERICAN HERITAGE DICTIONARY, *supra* note 207, at 1268.

209. *Bestfoods*, 524 U.S. at 66-67.

210. *Id.* at 72.

211. Prior to *Bestfoods*, the courts of appeals had fashioned an extensive multi-factor "actual control" test to determine when parent corporations and government agencies were liable as operators. See *supra* Part I.C.1 for a discussion of this test's genesis. The traditional test is not necessarily exclusive of the *Bestfoods* definition. However, prior to *Bestfoods*, lower courts focused less on a plain language definition of the term and more on various control factors that would show the defendant was an operator. *See supra* Part I.C.1. The most general formulation of the test seems to be that an operator is one who controls the personnel, operations, and finances of a facility. *See supra* Part I.C.1.

212. See *infra* this Part for a discussion of these cases.

213. 13 F. Supp. 2d 756 (N.D. Ill. 1998).

tor at its sister corporation's facility.[214] The *Browning-Ferris* court relied exclusively on the plain meaning of the word "operator."[215] Similarly, in *United States v. Green*,[216] a New York district court denied a motion to strike an affirmative defense in which the defendant[217] argued that he had insufficient control over a facility to qualify him as an operator under CERCLA.[218] Citing *Bestfoods*, the court stated that the defendant could not be held liable unless he "directly participated in the management of the facility's pollution control operations including decisions pertaining to the disposal of hazardous substances and compliance with environmental regulations."[219] The court made no mention of any traditional multi-factor tests. Finally, in *Datron, Inc. v. CRA Holdings, Inc.*,[220] the district court found that a business was not liable for a release caused by its subsidiary.[221] Like *Browning-Ferris* and *Green*, the *Datron* court relied solely on the *Bestfoods* definition, apparently forsaking the traditional tests.[222]

In the government liability context, the courts' rulings have not been so homogenous. In fact, judges have aligned into two factions. One faction, typified by Judge Boggs in *United States v. Township of Brighton*,[223] favors a low threshold of evidence that focuses solely upon the general operator definition provided by the Supreme Court in *Bestfoods*.[224] This test does not expressly require the intensive fact-finding involved in the traditional multi-factor tests. The other faction, consisting of Judges Moore and Dowd in *Brigh-*

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214. *See id.* at 765.

215. *See id.* at 763-64. The court found liability based upon actions taken by a joint officer (defendant Ter Maat) in the name of both corporations. *See id.* at 764-65. Among other things, Ter Maat, in his capacity as an officer for the sister corporation, took steps to procure a pollution control permit and conducted correspondence with the Illinois Environmental Protection Agency. *See id.*

216. 33 F. Supp. 2d 203 (W.D.N.Y. 1998).

217. In *Green*, the defendant was not a parent corporation but a sole shareholder. *See id.* at 209.

218. *See id.* at 217.

219. *Id.*

220. 42 F. Supp. 2d 736 (W.D. Mich. 1999).

221. *See id.* at 747-48.

222. Despite the fact that an officer of the parent corporation sought environmental liability coverage for the subsidiary, became involved in resolution of the EPA complaint, and assisted in obtaining an easement for a drainage pipe, the *Datron* court held that "[the parent's] involvement with the facilities falls soundly within the parameters of normal oversight." *Id.* at 748.

223. 153 F.3d 307 (6th Cir. 1998).

224. *See id.* at 313-14. See *supra* text accompanying note 209 for the text of this definition. A New York district judge also adopted Judge Boggs' view in *Delaney v. Town of Carmel*, 55 F. Supp. 2d 237, 260-61 (S.D.N.Y. 1999).

ton, defers to traditional multi-factor actual control tests.[225] This high threshold requires that a plaintiff satisfy a fact-intensive inquiry characterized generally by control over personnel, finances, and operations at a given facility.[226]

B. United States v. Township of Brighton[227]

In *Brighton*, a court of appeals addressed the issue of government operator liability under CERCLA for the first time. A three-judge panel of the United States Court of Appeals for the Sixth Circuit heard the case. Judge Boggs wrote the opinion of the court, adopting the *Bestfoods* definition of operator. Judge Moore concurred in the result, and Judge Dowd dissented in part and concurred in part. Both Judges Dowd and Moore argued that the traditional multi-factor tests were relevant in determining liability.

1. Factual Background

In 1960, the Township of Brighton, Michigan contracted with Vaughan Collett to use a portion of Collett's land as a municipal dump.[228] The township contracted to have Collett control the everyday operations of the dump within specifications set by the township, for which Collett was to be paid a monthly fee.[229] In 1965, Collett began having trouble maintaining the dump and asked the township for assistance.[230] The township agreed to provide a bulldozer and to assist in eliminating some of the waste by having the Junior Fire Department burn it.[231]

In the late 1960's, the State of Michigan began to regulate dumps more strictly and repeatedly warned the township that Collett's property was not in compliance with waste disposal regulations.[232] In 1973, after it became apparent that the contamination could not be easily remedied, the township decided to close the dump.[233] In 1989, a team of federal investigators examined the site

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225. *See Township of Brighton*, 153 F.3d at 322-31 (Moore, J., concurring); *id.* at 331-35 (Dowd, J., dissenting in part, concurring in part).

226. See *supra* Part I.C for a discussion of the development of this test.

227. 153 F.3d 307 (6th Cir. 1998).

228. *See id.* at 310.

229. *See id.*

230. *See id.* at 311.

231. *See id.*

232. *See id.*

233. *See id.*

and determined that it qualified for Superfund[234] money.[235] The United States undertook cleanup, and by 1995, the cost of cleanup had risen to approximately $500,000.[236] The United States brought suit against Collett and the township to recover the response costs.[237] After a bench trial, the district judge found the township liable.[238] On appeal, the township raised four defenses to liability: (1) the hazardous wastes in question were confined to areas that were not part of the township's dump, (2) it was not an "operator" under CERCLA, (3) all hazardous wastes were contributed by sources not affiliated with the township, and (4) the district court erred in stating that the harm and costs were indivisible, thereby holding the township liable for the entire cost of response.[239]

The court rejected the township's first and third defenses, holding that the entire property was a facility and that wastes had been mingled.[240] As to the fourth issue, the court remanded for further action by the district court, noting that the lower court had made an insufficient factual inquiry to support its holding.[241] This Note will next discuss the court's holding regarding the second defense.

2. Judge Boggs' Opinion for the Court

The *Brighton* court recognized the competing policy interests present in the case—the broad remedial purpose of CERCLA and the government's need to regulate waste disposal for the public's health and safety.[242] Unable to determine from the record whether the township had exercised sufficient control to be deemed an operator under CERCLA,[243] the Sixth Circuit remanded the case to the district court for further findings of fact.[244]

In providing guidance to the lower court, Judge Boggs advocated an actual control test based largely upon the Supreme Court's

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234. For a discussion of the Superfund and its uses, see *supra* notes 24-25 and accompanying text.

235. *See Township of Brighton*, 153 F.3d at 311-12.

236. *See id.* at 312.

237. *See id.*

238. *See id.*

239. *See id.* This Note discusses only the second argument.

240. *See id.* at 312-13 and 317, respectively.

241. *See id.* at 319-20. The Sixth Circuit remanded with instructions that the district court should make further factual determinations regarding the divisibility of the injury. *See id.* at 320.

242. *See id.* at 315.

243. *See id.*

244. *See id.* at 322.

definition of operator in *Bestfoods*.[245] However, Judge Boggs added that the party being subjected to liability need not have committed affirmative acts of pollution.[246] It is sufficient to show that the party took affirmative steps to take control of a facility; subsequent inaction is no defense.[247]

Judge Boggs also cited three cases, *Nurad, Inc. v. William E. Hooper & Sons Co.*,[248] *FMC Corp. v. United States Department of Commerce*,[249] and *United States v. Dart Industries, Inc.*,[250] for the proposition that government operator liability is possible if regulation of the facility in question is extensive enough.[251] However, Judge Boggs failed to accept any of the previously used multi-factor liability tests.[252] Rather, he stated that "mere regulation does not suffice to render a government entity liable, but actual operation (or 'macromanagement') does."[253]

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245. *See id.* at 314 (citing United States v. Bestfoods, 524 U.S. 51 (1998)). See *supra* text accompanying note 209 for the *Bestfoods* definition of operator. Generally, this definition means that an operator is simply someone who "directs the workings of, manages, or conducts the affairs of a facility." *Bestfoods*, 524 U.S. at 66.

246. *See Township of Brighton*, 153 F.3d at 315. While there need not be affirmative acts of pollution to hold a party responsible, that party will be held liable as long as it performed affirmative acts that made it an "operator" of the facility. *See id.* at 314-15.

247. *See id.* at 315.

248. 966 F.2d 837 (4th Cir. 1992).

249. 29 F.3d 833 (3d Cir. 1994).

250. 847 F.2d 144 (4th Cir. 1988).

251. *See Township of Brighton*, 153 F.3d at 314-15.

252. Recall that the multi-factor test developed by the majority of the cases discussed in Part I.C.1 required satisfaction of a lengthy factual analysis to establish operator liability. Generally, such tests were predicated upon factors such as personnel, financial, and operational control.

253. *Township of Brighton*, 153 F.3d at 316. The United States District Court for the Southern District of New York adopted Judge Boggs' view in *Delaney v. Town of Carmel*, 55 F. Supp. 2d 237 (S.D.N.Y. 1999), the only case after *Brighton* to address government operator liability. That case involved a contract between the DeLuca family and the Town of Carmel which allowed the town to use a portion of the DeLucas' land to dump septic wastes. *See id.* at 241-42. The town paid rent, required that the property meet certain specifications, and maintained the roads leading to the dump site. *See id.* at 242. Following a complex series of transactions over two decades, the plaintiffs purchased property for development near the former dump site. *See id.* at 243-44. The New York State Departments of Health and Environmental Conservation informed the plaintiffs that their wells were contaminated and should not be used. *See id.* at 244. The plaintiffs brought suit against a number of parties, including the town. *See id.* at 245.

The court cited to *Brighton*, applying the *Bestfoods* definitional test without relying upon any particular set of factors. *See id.* at 260-61. After considering the facts of the case and comparing them to the similar facts in *Brighton*, the court simply stated that "[p]laintiffs offer no facts to show that Carmel exercised any ongoing control over the disposal activities at the Site." *Id.* at 261. Although the court briefly mentioned

3. Judge Moore's Concurring Opinion

Judge Moore agreed with Judge Boggs' finding that there was insufficient evidence in the record to support a conclusive finding of operator liability.[254] However, the concurrence also noted that Judge Boggs failed to provide a specific operator liability test.[255] Judge Moore emphasized that, while government bodies have an inherent burden to regulate waste disposal for the public health and safety, private entities have no such burden.[256] To expose government entities to excessive operator liability would "'have a chilling effect on long-term remedial efforts, since states may be unwilling to act when CERCLA liability is sure to be imposed.'"[257] Judge Moore stated that it may be unwise to use the same liability tests for both government and private actors.[258] In addition, the concurrence noted that Judge Boggs' opinion provided insufficient guidance to the lower courts regarding an operator liability test.[259]

To resolve these problems, Judge Moore suggested adopting the test articulated in *Rockwell International Corp. v. IU International Corp.*[260] Specifically, Judge Moore emphasized the government's knowledge of the hazards caused by a facility's waste, participation in the facility's opening and closing, management and hiring of employees in areas relating to waste disposal, determination of operating plans, control over waste disposal, and public declarations of responsibility for the facility.[261]

4. Judge Dowd's Dissent

Judge Dowd stated that the facts on the record were insufficient to hold the government liable as an operator.[262] Judge Dowd,

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some of the traditional control factors (operational and personnel control), it made no indication that any of them could be determinative. *See id.* Instead, the court simply noted that *none* of the potential factors had been met. *See id.* Thus, *Delaney* is not particularly useful for the analysis of this Note, as the district judge failed to clarify why he chose one test over the other.

254. *See Township of Brighton*, 153 F.3d at 323-28 (Moore, J., concurring).

255. *See id.* at 325 (Moore, J., concurring).

256. *See id.* at 324 (Moore, J., concurring).

257. *Id.* (Moore, J., concurring) (quoting Olsen, *supra* note 2, at 204).

258. *See id.* (Moore, J., concurring).

259. *See id.* at 325 (Moore, J., concurring).

260. 702 F. Supp. 1384, 1390-91 (N.D. Ill. 1988); *see also Township of Brighton*, 153 F.3d at 327 (Moore, J., concurring) (citing United States v. Stringfellow, [1990] 20 Envtl. L. Rep. (Envtl. L. Inst.) 20,656, 20,658 (C.D. Cal. Jan. 9, 1990) (citing Rockwell Int'l Corp. v. IU Int'l Corp., 702 F. Supp. 1384, 1390-91 (N.D. Ill. 1988))). See *supra* notes 78-84 and accompanying text for a discussion of *Rockwell*.

261. *See Township of Brighton*, 153 F.3d at 327 (Moore, J., concurring).

262. *See id.* at 331 (Dowd, J., dissenting in part, concurring in part).

like Judge Boggs, stated that the *Bestfoods* standard is the controlling law in cases of government liability and parent corporation liability.[263] However, Judge Dowd stated that the multi-factor actual control tests adopted in cases like *FMC*, *Dart*, and *New Castle* are consistent with the *Bestfoods* definition of operator liability.[264] Accordingly, the dissent stated that the township should be absolved from operator liability because "there are no facts to indicate that Brighton Township hired the employees of the dump, had the authority to supervise or fire them, or managed the finances of the dump."[265] Additionally, Judge Dowd found it dispositive to liability that the township did not control "daily operations" at the facility.[266]

III. A Modified Version of the Multi-Factor Tests Is the Appropriate Standard for Government Operator Liability

Following *United States v. Bestfoods*,[267] the state of the law regarding government operator liability remains unclear. On one side of the argument lie the concurrence and dissent in *United States v. Township of Brighton*,[268] which follow the long CERCLA tradition of predicating operator liability upon extensive multi-factor control tests.[269] Although the concurrence and the dissent regarded *Bestfoods* as controlling, they argued that the traditional tests are consistent with *Bestfoods*.[270]

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263. *See id.* at 333 (Dowd, J., dissenting in part, concurring in part).

264. *See id.* at 334 (Dowd, J., dissenting in part, concurring in part).

265. *Id.* (Dowd, J., dissenting in part, concurring in part).

266. *See id.* at 335 (Dowd, J., dissenting in part, concurring in part).

267. 524 U.S. 51 (1998).

268. 153 F.3d 307 (6th Cir. 1998).

269. See *supra* Part I.C.1 for a discussion of the development of these tests and the factors the courts applied. Perhaps the most extreme example of the protracted multi-factor test is *Washington v. United States*, 930 F. Supp. 474 (W.D. Wash. 1996), in which a federal district court declined to impose liability on the government, citing a staggeringly specific and demanding list of necessary control factors. First, the *Washington* court invoked the factors from *FMC Corp. v. United States Department of Commerce*, 29 F.3d 833 (3d Cir. 1994) (en banc), which included "active involvement" in a plant's operation, government control of the product being created, levels of production, product price, and to whom the product would be sold. *See id.* at 843. The *Washington* court then distinguished *FMC*: (1) the War Production Board was absent in *Washington*, (2) the government in *Washington* did not force the facility to make a product it otherwise would not have made, (3) the government lacked authority to seize the plant, and (4) in FMC, a system of nationwide regulation was affected. *See Washington*, 930 F. Supp. at 485.

270. In the *Brighton* concurrence, Judge Moore stated, "I believe that Judge

Judge Boggs' opinion in *Brighton* offers the counter-argument to the multi-factor tests. Judge Boggs discarded the long-standing multi-factor tests and relied solely upon the definition offered by *Bestfoods*.[271] Thus, the question remains whether government operator liability should be determined by Judge Boggs' less demanding *Bestfoods* definitional test or by the more demanding traditional multi-factor tests. In answering this question, this Note will first argue that the *Bestfoods* test is controlling in the government operator liability context. Next, this Note will consider the policy arguments surrounding government operator liability. Finally, this Note will apply the policy considerations to the two tests and synthesize a workable liability standard.

A. *Does the* Bestfoods *Standard Apply to Government Operator Liability?*

In *Bestfoods*, the United States Supreme Court set the standard for parent corporation operator liability under CERCLA.[272] Significantly, the Supreme Court did not explicitly place any limitation on when this definition would apply. Thus, it may reasonably be argued that courts should apply the definition in both the governmental and non-governmental contexts.[273] There is clear prece-

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Boggs fails to define [the actual control] standard clearly so as to provide the lower courts with direct guidance as to when a government entity engages in regulatory activities extensive enough to make it an operator of the facility in question." *Township of Brighton*, 153 F.3d at 325 (Moore, J., concurring). Judge Moore went on to advocate a return to the multi-factor test as applied in *United States v. Stringfellow*, [1990] 20 Envtl. L. Rep. (Envtl. L. Inst.) 20,656, 20,658 (C.D. Cal. Jan. 9, 1990). *See Township of Brighton*, 153 F.3d at 327 (Moore, J., concurring). In dissent, Judge Dowd stated that the court should rely heavily upon the test elaborated in *FMC* and other multi-factor test cases. *See id.* at 333-34 (Dowd, J., dissenting in part, concurring in part). In addition, Judge Dowd noted that "[a]lthough [numerous multi-factor control test cases] were decided prior to the *Bestfoods* case, they are completely in line with *Bestfoods*' holding." *Id.* at 334 (Dowd, J., dissenting in part, concurring in part).

271. *See Township of Brighton*, 153 F.3d at 333 (Dowd, J., dissenting in part, concurring in part). In *Bestfoods*, the Supreme Court stated:

> [U]nder CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility. . . . [A]n operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.

Bestfoods, 524 U.S. at 66-67.

272. *See Bestfoods*, 524 U.S. at 67-70. See *supra* note 271 for the *Bestfoods* definition of "operator."

273. This seems to be one issue on which all three of the *Brighton* opinions agree, as they each state *Bestfoods* is controlling on the issues of corporate and government liability. *See Township of Brighton*, 153 F.3d at 314 (expressly adopting the *Bestfoods*

dent for the proposition that a rule which applies to private actors must apply equally to government actors.[274] Thus, it appears that *Bestfoods* provides the appropriate standard for both parent corporation and government liability. However, as discussed in the following sections, there are policy considerations applicable to government agencies that are not applicable to private actors.[275] Although *Bestfoods* appears to be the applicable standard, it is not clear what implications this decision has for government operator liability.

B. *What Exactly Does the* Bestfoods *Definition Require to Establish Government Liability?*

The *Bestfoods* Court conspicuously failed to follow the standard practice of the lower courts[276] when it declined to use a multi-factor test and instead applied a simple, common usage definition of operator.[277] However, the Court left open the question of whether the definition forecloses the use of multi-factor tests in determining operator liability. To date, this issue has only been addressed by one federal court of appeals, in *United States v. Township of Brighton*.[278] *Brighton* illustrated that courts could rea-

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definition); *id.* at 325 (Moore, J., concurring) (citing to *Bestfoods* definition); *id.* at 333 (Dowd, J., dissenting in part, concurring in part) ("I find that the *Bestfoods* standard should be applied to both the corporate form and the governmental entity situations.").

274. *See, e.g.*, *FMC Corp.*, 29 F.3d at 843 (stating that "[u]nder [CERCLA] section 120 [the state] is in the same position 'as any nongovernmental entity' with respect to CERCLA liability"); Thiokol Corp. v. Department of Treasury, 987 F.2d 376, 382 (6th Cir. 1993) (stating that "CERCLA also expressly provides that states are to be treated in exactly the same manner as nongovernmental owner/operators . . . including liability"). But see *supra* note 203 for a discussion of cases in which the courts have not imposed government liability. The cases discussed in note 203 have, in practice, created a higher hurdle to government liability; however, none of them expressly indicated that the standard is any higher than that which must be applied to corporate actors. In short, it appears that the courts recognize that there is no statutory support for diverse requirements, yet they remain reluctant to hold government agencies liable.

275. See *infra* Part III.C for a discussion of these policy considerations.

276. As noted earlier, courts evaluating government operator liability, like those evaluating corporate liability, have consistently advocated multi-factor tests. *See, e.g.*, United States v. Vertac Chem. Corp., 46 F.3d 803, 808 (8th Cir. 1995); *FMC Corp.*, 29 F.3d at 843-45; United States v. Dart Indus., Inc., 847 F.2d 144, 146 (4th Cir. 1988); Washington v. United States, 930 F. Supp. 474, 482-85 (W.D. Wash. 1996); United States v. Iron Mountain Mines, Inc., 881 F. Supp. 1432, 1449-50 (E.D. Cal. 1995); United States v. Stringfellow, [1990] 20 Envtl. L. Rep. (Envtl. L. Inst.) 20,656, 20,658 (C.D. Cal. Jan. 9, 1990); CPC Int'l, Inc. v. Aerojet-General Corp., 731 F. Supp. 783, 788 (W.D. Mich. 1989); United States v. New Castle County, 727 F. Supp. 854, 869-70 (D. Del. 1989).

277. See *supra* note 271 for the *Bestfoods* definition of operator.

278. 153 F.3d 307 (6th Cir. 1998).

sonably disagree on the issue. Writing for the majority, Judge Boggs held that the *Bestfoods* test required nothing more than affirmative acts indicating actual control and adopted that standard as the exclusive test for operator liability.[279] In contrast, the concurrence[280] and dissent[281] both agreed that, although the *Bestfoods* definition is applicable, it is nothing more than a guideline and that courts must consider additional factors to give the definition meaning on a case-by-case basis.

It is essential at this point to determine whether the *Bestfoods* Court intended for its decision to reinforce the status quo (minimal government liability) or open new doors to government liability. Having failed to answer this question expressly, the Supreme Court forces the lower courts to examine the two traditional, conflicting policy arguments relating to government liability: enforcing the broad remedial purpose of CERCLA and protecting government bodies from excessive liability.

C. *Enforcing the Broad Remedial Purpose v. Discouraging Government Regulation: The Competing Policy Considerations*

The competing policy interests of CERCLA's broad remedial purpose and the public interest in avoiding creation of a disincentive for government environmental regulation are pivotal to the question of whether to apply the multi-factor tests or the simplified *Bestfoods* test. Careful consideration of these interests indicates that government actors may deserve special treatment in the application of the operator liability provision of CERCLA.[282]

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279. *See id.* at 314.

280. *See id.* at 325-27 (Moore, J., concurring).

281. *See id.* at 333-35 (Dowd, J., dissenting in part, concurring in part).

282. Some areas of special government treatment are found in the text of CERCLA itself. For example, state and local governments cannot be held liable for emergency actions taken to remedy releases or threatened releases from a third party's facility. *See* 42 U.S.C. § 9607(d)(2) (1994). This section clearly recognizes (at least to a limited degree) that there should be some grace granted to government agencies in light of their regulatory capacity. In addition, 42 U.S.C. § 9601(20)(D) indicates that the government does not become an operator when it acquires ownership of a facility through "bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign." *Id.* However, the courts have been slow to carve out exceptions to other types of CERCLA liability for government agencies. *See, e.g.*, Westfarm Assocs. Ltd. Partnership v. Washington Suburban Sanitary Comm'n, 66 F.3d 669 (4th Cir. 1995) (finding owner and operator liability when a publicly owned sewer system leaked hazardous chemicals); B.F. Goodrich Co. v. Murtha, 958 F.2d 1192 (2d Cir. 1992) (finding arranger liability for municipalities that disposed of household waste); Artesian Water Co. v. New Castle

1. The Broad Remedial Purpose

Environmental contamination is indeed a problem of "national magnitude."[283] A large portion of the hazardous waste in the United States is improperly disposed of, often in poorly-operated landfills.[284] In fact, in the early 1980's, the EPA found that more than sixty percent of all landfills were not in compliance with government environmental regulations, and over twenty percent were found to have already caused contamination to air or water.[285] In addition, the EPA estimated that seventy-three million Americans lived in close proximity to a contaminated facility.[286] These numbers have skyrocketed; a more recent study estimates that over eighty-five percent of Superfund sites have contaminated adjoining waters,[287] and that seventy million Americans live within four miles of a CERCLA site.[288] The United States is indeed "neck-deep in waste."[289]

In passing CERCLA, to ease the burden of cleanup, "Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created."[290] Accordingly, throughout CERCLA's history courts have consistently recognized that the statute is designed to provide a broad base of liable parties.[291] In the parent corporation context, the courts have repeatedly upheld a corporate liability standard that extends far beyond traditional

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County, 851 F.2d 643 (3d Cir. 1988) (finding government owner liability for a release at a public landfill).

283. *See* United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982).

284. *See* Ferrey, *supra* note 10, at 211.

285. *See id.*

286. *See* Lucia Ann Silecchia, *Pinning the Blame and Piercing the Veil in the Mists of Metaphor: The Supreme Court's New Standards for the CERCLA Liability of Parent Companies and a Proposal for Legislative Reform*, 67 FORDHAM L. REV. 115, 117 (1998) (citing Marc D. Potson, Comment, *Redefining CERCLA Arranger Liability: Making the Responsible Party Pay*, 3 MO. ENVTL. L. & POL'Y REV., 216, 216 (1990)).

287. *See* McCrory, *supra* note 39, at 60 (citing KATHERINE N. PROBST ET AL., FOOTING THE BILL FOR SUPERFUND CLEANUPS: WHO PAYS AND HOW? 20, 24 (1995)).

288. *See id.* (citing *Superfund Reassessment and Reauthorization: Hearings Before the Subcomm. on Superfund, Waste Control, and Risk Assessment of the Senate Comm. on Env't and Pub. Works*, 104th Cong. 428 (1995) and *U.S. EPA Synopsis: Superfund Administrative Reforms, Annual Report Fiscal Year 1996* (1996)).

289. *See* Ferrey, *supra* note 10, at 200.

290. United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982).

291. See *supra* note 2 for examples of the courts' recognition of the broad remedial purpose in the context of determining liability.

common law practices.[292] However, the question remains whether this type of policy consideration must extend to government actors.

Courts and commentators have generally agreed that the broad remedial purpose is sufficient to justify holding government actors liable under CERCLA.[293] However, there remains a legitimate argument that any form of government liability violates the broad remedial purpose. As noted earlier, CERCLA's goal is to make the polluter pay.[294] In the corporate context this liability scheme is an effective means of ensuring that the controlling parent corporation does not escape liability. However, when the government pays for cleanup, the taxpayer—not some distant third party—is stuck with the bill.[295] One could argue that this view is flawed because, in a democratic government, decisions are made by elected officials.[296] If the taxpayers elect officials who pollute, perhaps the voters should pay for their error in judgment. In effect, each taxpayer would become a parent of the elected government. However, this argument ignores the fact that, unlike a parent corporation, the public does not have the ability to control the day-to-day acts of those people it places in power. A parent corporation may immediately, and often with minimal formality, influence and overturn disfavored decisions made by subordinates. Voters, on the other hand, must wait until the next round of elections. In addition, voters only wield power when acting as a group, unlike a parent corporation.

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292. *See* Stewart & Campbell, *supra* note 3, at 7. See also *supra* notes 34-37 and accompanying text for further discussion of CERCLA's broad liability scheme.

293. *See* Steven G. Davison, *Governmental Liability Under CERCLA*, 25 B.C. ENVTL. AFF. L. REV. 47, 127 (1997) (stating that government actors should be held liable in the same circumstances as private actors); Ferrey, *supra* note 10, at 273-74 (noting that, given CERCLA's purpose, it would be inequitable to treat government bodies, specifically municipalities, different than private actors); Williamson & McCann, *supra* note 4, at 438 (arguing that government immunity from CERCLA liability would be inconsistent with Congress' intent in passing CERCLA). *But see* Olsen, *supra* note 2, at 204 (noting that although government liability is a legal reality, the courts should be careful not to impose such liability without consideration of the consequences).

294. See *supra* note 2 for a discussion of the broad remedial purpose.

295. *See* Carley, *supra* note 26, at 105 ("When viewed in the context of the United States as the 'polluter,' the basic policy goals of CERCLA are not furthered, as the government does not pay; the taxpayer does."). In addition, liable corporations are able to internalize the cost of cleanup by increasing prices. Government agencies that do not make a profit from their regulatory activities have no way to dilute the effects of cleanup costs other than to raise taxes. *See also* Tricia R. Russo, FMC Corp. v. United States Department of Commerce: *An Overexpansion of "Operator" Liability Under CERCLA*, 7 VILL. ENVTL. L.J. 157, 178-79 (1996).

296. Except, of course, that administrative officials are appointed by elected representatives.

Thus, there is a serious question whether any form of government operator liability supports the ideal of making the polluter pay.

On the other hand, some commentators have supported similar treatment for government and private actors by citing the practical effects of such liability. Commentators have noted three primary reasons why CERCLA parent corporation liability supplants the common law of limited liability: (1) possible liability encourages the actor to closely regulate environmental compliance practices, (2) liability discourages potential actors from assuming the corporate form for no other reason than to avoid liability, and (3) strict liability reduces transaction costs associated with many common law requirements of pleading and proof.[297] The first and third reasons may apply to government actors as well as private actors.[298] The public maintains a legitimate interest in having its governmental bodies properly organize and manage their waste facilities, and transaction costs are reduced by strict liability in the government context as well as in the private sphere. However, these arguments provide weak support for government liability. Although there is a public interest in properly managed waste facilities, government liability may actually discourage government regulation.[299] Also, a reduction in transaction costs, while generally beneficial, loses its luster when it imposes liability in situations where liability would otherwise be inappropriate.

Clearly, there are strong arguments that indiscriminate government liability does not support CERCLA's broad remedial purpose. However, despite any weight these arguments may carry, the courts seem unprepared to eliminate government liability altogether. Instead, they appear to favor such liability on a limited basis. To understand the courts' reluctance to impose government liability it is essential to consider the dangers of overexposure to operator liability.

2. Government Overexposure: Burdening the Sovereign and Creating a Disincentive to Regulate

Unlike private actors, governmental bodies "possess and exercise regulatory power in their capacity as guardians of the public

297. *See* Stewart & Campbell, *supra* note 3, at 8.

298. The second clearly does not apply, since businesses cannot assume a governmental form to escape liability.

299. See *infra* Part III.C.2 for a discussion of how imposing government liability could discourage involvement in waste disposal.

health, safety, and welfare."[300] Thus, it is common for government involvement in the waste disposal process to be predicated upon the responsibilities the government actor bears as the sovereign.[301] For example, municipalities are almost invariably involved, either as direct participants or on a contractual basis, with the removal and disposal of household (and sometimes industrial) waste.[302] As a result, if courts began to impose liability on governmental bodies frequently, those agencies could be unduly burdened by cleanup costs.[303]

The *Iron Mountain* court found such arguments unconvincing, stating that CERCLA's broad liability scheme *does* require private parties to clean up hazards created by other parties.[304] However, the parent corporation role in waste cleanup is not analogous to that of governmental bodies. The essential difference is that the government's role is not voluntary, whereas the private actor's conduct is voluntary.[305] Thus, it appears unfair to burden the government with liability based solely upon mandatory actions taken in a regulatory function; the corporate actor faces no such similar threat.

The *Brighton* concurrence noted one commentator's concern that overexposing governmental bodies to liability could create a disincentive to undertake any environmental regulation.[306] Such an

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300. United States v. Township of Brighton, 153 F.3d 307, 324 (6th Cir. 1998) (Moore, J., concurring).

301. *See id.* (Moore, J., concurring) (stating that "[g]overnmental entities increasingly are exercising their regulatory power in an effort to address the environmental problems created by the release of hazardous materials").

302. *See* Ferrey, *supra* note 10, at 233 (noting that municipalities in particular are almost always engaged in some liability-creating conduct relating to the removal and disposal of household and industrial wastes). At times, even this apparently benign involvement may lead to liability. *See* B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1206 (2d Cir. 1992) (denying motion for summary judgment by municipalities claiming immunity from arranger liability for disposal of normal household waste).

303. *See* Ferrey, *supra* note 10, at 274 (stating that municipalities would face a potentially immense financial burden under CERCLA liability predicated upon waste removal).

304. *See* United States v. Iron Mountain Mines, Inc., 881 F. Supp. 1432, 1445 (E.D. Cal. 1995) ("CERCLA does encourage private cleanup of pollution caused by others by exposing current owners to liability and at the same time providing them with a cause of action for the recovery of their costs.").

305. In other words, the sovereign does not "choose" to have regulatory control—such control is normally mandated. On the other hand, the private actor has control over whether to engage in the waste-producing activity or whether to purchase a piece of polluted property.

306. *See Township of Brighton*, 153 F.3d at 324 (Moore, J., concurring) (quoting, Olsen, *supra* note 2, at 204 (stating that "widespread state liability may have a chilling

influence could reduce necessary government involvement in environmental protection—certainly a result incompatible with the broad remedial purpose of preserving the environment.[307] Another commentator indicated that increasing government liability could have a financial, as well as environmental, impact.[308] The cost of liability would result in higher property taxes, and "[a]s a result, current property taxpayers would indemnify [potentially responsible] municipalities for past waste disposal practices . . . ."[309]

D. *Evaluating the Alternative* Bestfoods *Interpretations and Synthesizing a Workable Test for Government Liability*

For the reasons already discussed, governmental bodies should be treated differently than corporations.[310] However, both the traditional multi-factor tests and the *Bestfoods* definition fail to properly balance the applicable policy considerations with the need for a practical, consistent test for government operator liability. This Note will now evaluate the shortcomings of each test and synthesize a workable liability standard.

1. The Traditional Multi-Factor Tests Are Ineffective Because They Are too Easily Manipulated and Unpredictable

Because courts using multi-factor tests have frequently recog-

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effect on long-term remedial efforts, since states may be unwilling to act when CERCLA liability is sure to be imposed")); *cf.* Carley, *supra* note 26, at 102 ("If the federal government were held liable for its attempts to clean up hazardous waste sites, the government would not engage in such activities.").

307. One commentator has noted that this theory could also apply to parent corporations, by discouraging them from becoming involved in their subsidiaries' waste management activities. *See* Silecchia, *supra* note 286, at 178-84. However, Silecchia goes on to refute this argument, noting that there are five primary reasons that parent corporation liability would not reduce involvement in waste disposal activities: (1) The parent's financial ties to the subsidiary encourage participation, (2) corporations may often have subsidiaries large enough to handle waste management independently, (3) parent corporations that own all of a subsidiary's stock will automatically exercise a great deal of liability-creating control over management whether or not they actively participate in waste disposal, (4) the parent will have an incentive to avoid environmental litigation for the purposes of avoiding bad publicity, and (5) the expansive liability scheme provided by *Bestfoods* will encourage corporations to develop new waste disposal technologies. *See id.*

308. *See* Ferrey, *supra* note 10, at 274-76.

309. *Id.* at 274; *see also* Russo, *supra* note 295, at 179-80 ("[*FMC*] has paved the way for enormous governmental liability which will ultimately be paid with taxpayer dollars."); Carley, *supra* note 26, at 95 ("Although it is difficult to estimate the financial impact on the government of the [*FMC* court's finding of government liability], it is clear that the cost will be significant.").

310. *See supra* Part III.C.

nized the possibility of government liability, but have imposed it sparingly, it may seem that they have been approaching the problem correctly all along. After all, at first glance such an approach appears to give governmental bodies appropriate protection. However, multi-factor tests are hopelessly malleable and unpredictable, providing little guidance to courts or government actors.

The multi-factor tests' shortcomings become clear upon consideration of the holdings in *United States v. Iron Mountain Mines, Inc.*[311] and *Washington v. United States*.[312] Both *Iron Mountain* and *Washington* featured fact patterns quite similar in substance to *FMC Corp. v. United States Department of Commerce*,[313] in which the appellate court found liability. However, both district courts rejected government liability, citing the absence of factors not mentioned in previous cases.[314]

In *FMC*, probably the most cited case on government operator liability, the court adhered roughly to the employee/operational/financial control test, but added more specific factors that it called "the leading indicia of control."[315] The *Iron Mountain* court, despite the presence of considerable evidence of control,[316] failed to find liability based upon a series of three factors, two of which it found were established by *FMC*.[317] Even more dramatic is the court's failure in *Washington* to find liability despite overwhelming evidence of control.[318] In *Washington*, the court dismissed what have normally been considered the truly important indicia. Instead, the Court relied on a set of four unusual factors, including two regarding the relevance in *FMC* of the War Production Board and

311. 881 F. Supp. 1432 (E.D. Cal. 1995).

312. 930 F. Supp. 474 (W.D. Wash. 1996).

313. 29 F.3d 833 (3d Cir. 1994).

314. See *supra* Part I.C.2.b for a discussion of the holdings and tests applied in the *Iron Mountain* and *Washington* cases.

315. *See FMC Corp.*, 29 F.3d at 843. For a list of these indicia, see *supra* text accompanying note 161.

316. *See supra* text accompanying notes 189-191.

317. See *supra* text accompanying note 195 for a list of those factors. The third factor, control over waste disposal, has clearly been established by a majority of cases discussed in this Note. *See supra* Part I.C.2.b. However, it is interesting that the *Iron Mountain* court chose to discuss it in relation to *FMC*. In *FMC*, the court found that the government had knowledge of disposal techniques, understood that increased production meant increased waste, and provided some disposal equipment. *See supra* notes 144-152. With the exception of providing equipment, these factors seem to be present in *Iron Mountain* as well. *See supra* notes 189-195.

318. See *supra* text accompanying note 198 for a discussion of this evidence.

national regulation,[319] the fact that the shipyard was making the same product,[320] and the fact that the facility was never seized. What appears to be happening is that each successive case declines to find liability based on some factor established in the previous case, preventing government liability even where substantial control is evident.[321]

This case-by-case addition of factors invites judicial improvisation and makes the traditional multi-factor tests completely unpredictable.[322] As revealed by *Iron Mountain* and *Washington*, liability depends upon the inclinations of the individual judges. Accordingly, one commentator has noted that the multi-factor tests result in an "adhoc factual analysis [that] may subject states to open-ended liability if the courts are not willing to closely examine the particular state's alleged involvement at [the] . . . site."[323] History has proven this prediction incorrect (as the multi-factor tests' flexi-

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319. Although, the court never explains what relevance this has and why it is determinative.

320. However, it is obviously a questionable assertion that the shipyard would otherwise have been producing mine-sweepers for private industrial consumption.

321. The list began to grow immediately following *United States v. Dart Indus., Inc.*, 847 F.2d 144 (4th Cir. 1988). In that case, the court gave little guidance, simply requiring "hands on" activities. *See id.* at 146. The following year, the court in *United States v. New Castle County*, 727 F. Supp. 854 (D. Del. 1989), built upon the theoretical foundation of *Dart*, but added an extensive list of factors to be considered. *See id.* at 869. Later, in *FMC Corp. v. United States Department of Commerce*, 29 F.3d 833, 843 (3d Cir. 1994) (en banc), the Third Circuit cited to *New Castle*, but added a new list of factors that it called the "leading indicia of control." *Id.* The court used these factors to impose liability upon the government. *See id.* at 844-45. The court in *United States v. Vertact Chemical Corp.*, 46 F.3d 803, 807-09 (8th Cir. 1995), drew upon the *FMC* factors (apparently regarding certain of them as determinative) to find the government not liable. In *United States v. Iron Mountain Mines, Inc.*, 881 F. Supp. 1430, 1449-50 (E.D. Cal. 1995), a federal district court failed to find government liability because the facts of the present case did not match up to the overwhelming indicia of control in *FMC*. Finally, in *Washington v. United States*, 930 F. Supp. 474, 485 (W.D. Wash. 1996), a federal district court refused to find government liability based upon four arcane "determinative" factors established in *FMC*. See *supra* text accompanying note 201 for a list of these factors.

322. This trend toward an increasingly long list of specific factors has effectively shielded the government from operator liability, possibly to the point of violating CERCLA's broad remedial purpose. By continuously adding to the list of necessary factors, the courts have raised the evidentiary burden of parties seeking government liability. Of course, the more factors that are added, the more difficult it is to show that those factors have been satisfied. In addition, *Iron Mountain* and *Washington* illustrate a developing trend toward regarding the factors as determinative, rather than cumulative, despite the fact that courts have repeatedly stated that the test is the totality of the circumstances. *See, e.g.,* United States v. Township of Brighton, 153 F.3d 307, 327 (6th Cir. 1998) (Moore, J., concurring); *New Castle County*, 727 F. Supp. at 869.

323. Olsen, *supra* note 2, at 204.

bility has weighed for, not against, the government), but commentators still generally agree that a greater degree of certainty in assigning liability would be desirable.[324]

One positive aspect of the multi-factor tests is that, if applied consistently, they offer a detailed and useful standard for liability. The problem is that they have not been applied consistently. Furthermore, the list of potential factors has become so long and convoluted that it would be insufficient to simply state that the multi-factor tests are controlling. One would have to determine which incarnation of the test is applicable.

2. The *Bestfoods* Definition Could Over-Expose the Government to Liability and Is too Vague to Serve as an Adequate Liability Standard

As the standard with the lower evidentiary burden (due to the lack of specific facts that must be proven to establish liability), the *Bestfoods* definition is the test most likely to overexpose the government to liability. The *Bestfoods* Court simply stated that "an operator must manage, direct, or conduct operations specifically related to pollution."[325] One could argue that this test covers, by definition, every regulatory act taken by a governmental body. However, imposing absolute government liability would clearly be contrary to Congress' intent in passing CERCLA.[326] It is therefore reasonable to conclude that the Supreme Court intended to create a more discriminating liability standard than absolute liability.

On the other hand, one could argue that the *Bestfoods* requirement for affirmative acts precludes the possibility that a government actor could be held liable for mere regulation. In fact, the Supreme Court specifically stated that an operator is one who "directs the workings of, manages, or conducts the affairs of a facility."[327] This, in conjunction with the requirement that control must specifically relate to contamination,[328] could give the government

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324. *See id.* *See generally* Davison, *supra* note 293, at 127 (concluding that government liability should be equivalent to private actor liability); Ferrey, *supra* note 10, at 274-75 (stating that equity demands an even-handed approach to assigning liability); Williamson & McCann, *supra* note 4, at 440-41 (noting that courts, when left to their own devices, have a tendency to drift into "peripheral matters" rather than focus on the important indicia of control).

325. United States v. Bestfoods, 524 U.S. 51, 66 (1998).

326. *See* Williamson & McCann, *supra* note 4, at 443 (stating that Congress' intent was to only place liability upon "truly responsible parties").

327. *Bestfoods*, 524 U.S. at 66.

328. *See id.*

ample protection against unwarranted liability. It should also be noted that in the one circuit case where the new definitional test has been applied, it has been used to question a lower court's finding of municipal liability.[329] Still, because the *Bestfoods* definition does not rely on factors, the courts will lose the ability to raise the evidentiary burden against government actors. Consequently, they will lose the ability to give governmental bodies adequate protection from excessive liability.

The *Bestfoods* definition is also far too vague to serve as a useful liability standard. One commentator has called the language of the *Bestfoods* definition broad and "susceptible to varying interpretations," noting that a number of words used by the Supreme Court, including "manage," "direct," and "conduct" are no more helpful than the word "operate," as used in CERCLA's statutory language.[330] With only this vague guidance, it is inevitable that courts will eventually revert to the old practice of relying on multi-factor tests. However, for better or worse, *Bestfoods* is now the controlling law. Thus, in order to follow the Supreme Court's holding in that case, the lower courts will have to apply tests that take into consideration the *Bestfoods* definition.

3. Synthesizing a Workable Test for Liability

The multi-factor tests, as applied by courts in the past, appear too malleable and unpredictable.[331] In addition, they appear to create an unreasonably high bar to government liability. On the other hand, the *Bestfoods* definition is nebulous and vague, offering little guidance to courts faced with determining government liability. This test may also provide government actors with insufficient protection from excessive liability. However, there is a way to combine the best parts of the *Bestfoods* definition and the traditional multi-factor tests to synthesize a workable standard for liability that also addresses the need for certainty.

Bestfoods should be read as advocating a multi-factor test; however, unlike the *Brighton* concurrence's[332] and dissent's[333] readings of *Bestfoods*, the Supreme Court's mandate should not be

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329. *See* United States v. Township of Brighton, 153 F.3d 307, 319-21 (6th Cir. 1998).

330. *See* Silecchia, *supra* note 286, at 176-77.

331. See *supra* note 106 for examples of the courts' inconsistent applications and divergent interpretations of these tests.

332. *See Township of Brighton*, 153 F.3d at 327 (Moore, J., concurring).

333. *See id.* at 334 (Dowd, J., dissenting in part, concurring in part).

read as a reversion to the traditional test. As noted earlier, the traditional multi-factor tests, like the *Bestfoods* definitional test, allow courts far too much leeway in determining not only liability, but the standard for finding liability.[334] In fact, the very vagueness of the Supreme Court's definition in *Bestfoods* indicates that the Court must have intended for the definition to be used in conjunction with some other method of liability determination.[335] To take the vague *Bestfoods* definition at face value would be an exercise in futility without some deference to a more conclusive list of factors. Still, the fact that the Court failed to recognize established precedent indicates that the Court did not intend a return to the old multi-factor tests.

There is sufficient language in *Bestfoods* to establish a new, more conclusive, multi-factor test. The Supreme Court first stated that "an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility."[336] This seems sufficient to establish a requirement for affirmative acts, effectively eliminating a test based on authority to control.

Next, the Court indicated that the actor must be involved in "operations specifically related to pollution."[337] This is a clear requirement that the actor have operational control, one of the three traditional factors in the multi-factor tests.[338] However, this leaves open the question of what constitutes operational control. The Court addressed this concern and indicated that the operations must be those "having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations."[339] This reveals that the operational control must specifically relate to waste disposal. Although this could include such factors as personnel and financial control (factors used by courts prior to *Bestfoods*), the test would only be satisfied if the control specifically related to waste disposal.[340]

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334. See *supra* notes 323-324 and accompanying text for a discussion of commentators' criticisms of this test.

335. One commentator has noted that the *Bestfoods* decision left two significant issues regarding operator liability undecided: (1) "how 'operator' should be defined for purposes of assessing direct liability," and (2) "how the definition of 'operator' may best be applied." Silecchia, *supra* note 286, at 122. In fact, Silecchia argued that these questions are best handled by the legislature, not the courts. *See id.* at 178.

336. United States v. Bestfoods, 524 U.S. 51, 66 (1998).

337. *Id.*

338. The other two factors are control over personnel and control over finances. For further discussion of the development of this test, see *supra* Part I.C.

339. *Bestfoods*, 524 U.S. at 66-67.

340. For example, suppose a municipality contracted for the operation of a land-

Finally, once a court determines that such operational control exists, it must consider whether the control was "eccentric under accepted norms" of governmental regulatory oversight.[341] If so, it is clear that the government has overstepped its bounds as the sovereign and has undertaken the role of "operator."

Thus, *Bestfoods* seems to advocate a new three-part test requiring: (1) affirmative acts of control over the facility, (2) operational control relating directly to the disposal of hazardous waste, and (3) evidence that such control was above and beyond the government's normal regulatory power.

4. Applying the New Test to Government Operator Liability Cases

Applying this new test to some of the factual scenarios discussed in this Note, it becomes clear that this synthesis achieves a just result that balances CERCLA's competing policy interests.[342]

Under the new test, the majority of decisions reached by the courts are correct. For example, *United States v. Iron Mountain Mines, Inc.*,[343] *United States v. Vertac Chemical Corp.*,[344] and *FMC Corp. v. United States Department of Commerce*[345] were decided correctly. In all three cases there were undoubtedly affirmative acts of control by the government; therefore, the first prong of the new test is satisfied. It is the second prong, operational control relating to waste disposal, that necessitates closer examination.

In *Iron Mountain*, the court rightly declined to impose liability. The new test upholds this determination because, although the government took a high degree of control over the facility, it did not control waste disposal. Although the government hired personnel

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fill. The town hired personnel, set wages, approved purchases of equipment (not related to waste disposal), and helped set policies regarding operating hours. The municipality, despite these elements of control, could not be held liable because it did not exercise any of its control in the area of waste disposal. Although it had personnel control, town officials did not make disposal decisions—the facility owner's managers did. Although the town exercised financial control, it did not control items and equipment that affected waste disposal. Finally, even though it had some operational control (setting hours), it did not affect the manner of the facility's operation regarding waste disposal.

341. *See Bestfoods*, 524 U.S. at 72.

342. See *supra* note 12 and accompanying text for a discussion of CERCLA's competing policy interests.

343. 881 F. Supp. 1432 (E.D. Cal. 1995). See *supra* Part I.C.2.b for the facts of *Iron Mountain*.

344. 46 F.3d 803 (8th Cir. 1995). See *supra* Part I.C.2.b for the facts of *Vertac*.

345. 29 F.3d 833 (3d Cir. 1994). See *supra* Part I.C.2.b for the facts of *FMC*.

(and managed them to some degree), it was the civilian managers, not the government, that made disposal decisions.[346] In addition, there is no indication that the government hired any personnel at the decision-making level. Also, despite the fact that the government made certain improvements to the facility[347] and determined what product it would make,[348] none of these actions pertained directly to waste disposal.

In *Vertac*, where the government exercised even less control than it did in *Iron Mountain*, the court similarly found the government not liable.[349] In *Vertac*, the government had control over certain health and safety related conditions at the plant,[350] assisted the facility in obtaining raw materials,[351] and influenced what product the facility produced.[352] However, as in *Iron Mountain*, none of the control directly related to the disposal of waste. The *Vertac* court, in fact, emphasized that the facility's owner was solely responsible for waste disposal policy.[353]

In *FMC*, the court correctly imposed liability on the government. In that case, the government directly affected waste disposal by placing in the facility government-employed, management level personnel.[354] Although there were many other indicia of government control upon which the district court focused,[355] none of them affected waste disposal. Thus, the one decisive factor in finding liability is that which implicates the disposal of waste.

On the other hand, under the new test, *Washington v. United States*[356] was decided incorrectly. In *Washington*, like *Iron Mountain*, the government placed on-site supervisors in the facility who "participated in managing and supervising the workers," and the

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346. *See Iron Mountain, Inc.*, 881 F. Supp. at 1450.

347. *See id.* at 1449.

348. *See id.* at 1436.

349. *See Vertac Chem. Corp.*, 46 F.3d at 809.

350. *See id.* at 806-07.

351. *See id.* at 807.

352. *See id.* at 806.

353. *See id.* at 807.

354. *See* FMC Corp. v. United States Dep't of Commerce, 29 F.3d 833, 837 (3d Cir. 1994) (en banc). Note that this scenario is different from the one posed in the hypothetical in note 340. The hypothetical government-hired employee was an employee of the civilian owner (albeit chosen by the government) and was not a management-level employee, whereas in *FMC* the management personnel were government employees.

355. *See id.* at 844-45.

356. 930 F. Supp. 474 (W.D. Wash. 1996). See *supra* Part I.C.2.b for the facts of *Washington*.

government provided financing and equipment for use at the facility.[357] Also like *Iron Mountain*, this case contained numerous control factors that could lead one to conclude, mistakenly, that the government was an operator for CERCLA purposes.[358] Still, the majority of the government's control factors had nothing to do with waste disposal and thus should not be used to determine operator liability. However, as noted earlier, the installation of government managers was sufficient for liability to attach in *FMC*.[359] Through these managers, the government had at least some degree of control over the facility's waste disposal practices. Finally, the presence of full-time government managers, as in *FMC*, indicated a step above and beyond that which the government normally takes as a regulator.

This new test may, on its face, appear to heavily favor governmental bodies; however, one must keep in mind that CERCLA's purpose is to hold accountable those who were responsible for contamination.[360] Under this test, the government can only be held responsible if it actively participated in the actual disposal of waste—the very function CERCLA was intended to regulate.

CONCLUSION

The development of operator liability rules, particularly those pertaining to the government, has involved a long and arduous process through the courts. In *Bestfoods*, the Supreme Court provided a far simpler test that has already been applied in *Brighton*; however, the test has the potential of creating havoc in an area already plagued by uncertainty. The benefits of this new test could be immensely augmented by synthesizing it with the traditional multi-factor tests used by courts since CERCLA's inception. The new three-factor test advocated in this Note balances the competing policy interests of CERCLA's broad remedial purpose and the danger of creating a disincentive to regulate. This test adds a degree of certainty previously unavailable in government operator liability jurisprudence.

Christopher J. Plaisted

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357. *See id.* at 483.

358. *See id.* at 483-84.

359. See *supra* notes 155-168 and accompanying text for the FMC court's definition of "operator."

360. See *supra* note 2 for a discussion of CERCLA's broad remedial purpose.